

Before the
Federal Communications Commission
 Washington, D.C. 20554

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In the Matter of)
)
 Improving Communications Services for Native) WT Docket No. 11-40
 Nations by Promoting Greater Utilization of)
 Spectrum over Tribal Lands)
)

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker
 issuing separate statements.

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I. INTRODUCTION

1. Historically, members of federally-recognized American Indian Tribes and Alaska Native Villages ("Tribes") and other residents of Tribal lands have lacked meaningful access to wired and wireless communications services. This remains true today. In particular, many Tribes suffer the effects of limited availability of wireless services on Tribal lands. Greater access to wireless services would offer members of Tribes and others on Tribal lands significant economic opportunities and increased social benefits. Despite the Commission's existing programs that seek to promote the deployment of both wireless and wireline communications services on Tribal lands, we believe that additional steps are necessary to encourage the further deployment and use of spectrum for Wireless Radio Services over Tribal lands.¹ This Notice of Proposed Rulemaking ("Notice") therefore seeks comment on a range of specific proposals and issues with the objective of promoting greater use of spectrum over Tribal lands.

2. Many of the proposals discussed in this Notice are the product of efforts by the Commission and tribes around the country to consult on communications issues. Such efforts have been undertaken in accordance with the trust responsibility of the federal government to, and its government-to-government relationship with, federally-recognized Tribes and Alaska Native Villages.² The Commission has long been committed to promoting the government-to-government relationship between the Commission and federally-recognized Tribes.³ In the course of that ongoing dialogue, Tribes and their representatives have expressed views on communications and spectrum-related problems in Tribal lands and have proposed possible solutions.⁴ Drawing upon that record, we consider a number of those spectrum-related proposals in this Notice.

II. BACKGROUND

A. Access to Communications Services in Tribal Areas Lags Far Behind National Levels

3. While competitive market forces have spurred robust wireless communications services in many areas,⁵ connectivity for Tribes and other residents in many Tribal areas remains at significantly

¹ The proposals on which we seek comment in this Notice of Proposed Rulemaking would all be subject to uniform definitions of Wireless Radio Services and Tribal lands described in section III.F. of this Notice.

² Statement on Policy on Establishing a Government-to-Government Relationship with Indian Tribes, *Policy Statement*, 16 FCC Rcd 4078 (2000) ("*Tribal Policy Statement*") and President Obama's Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, published at 74 Fed. Reg. 57,879 (Nov. 9, 2009).

³ *Tribal Policy Statement*.

⁴ See, e.g., National Tribal Telecommunications Association, Comments, WC Docket No. 05-337, CC Docket No. 96-45, WC Docket No. 03-109, WC Docket No. 06-122, CC Docket No. 99-200, CC Docket No. 96-98, CC Docket No. 01-92, CC Docket No. 99-68, WC Docket No. 04-36, Nov. 25, 2008 ("NTTA Comments"); Native Public Media and National Congress of American Indians, Joint Comments, GN Docket Nos., 09-47, 09-51, 09-137, Nov. 9, 2009 ("NPM-NCIA Joint Comments"); National Congress of American Indians, Native Public Media, New America Foundation's Open Technology Initiative, and the Southern California Tribal Chairmen's Association, *Ex Parte* Comments, GN Docket Nos. 09-47, 09-51, 09-137, Dec. 24, 2009 ("December 2009 *Ex Parte* Joint Comments").

⁵ See Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Fourteenth Report*, FCC 10-81 (2010).

lower levels. Estimates indicate that 80% of the overall population on Tribal lands is covered by current generation (3G) wireless technologies, which permit mobile voice and internet services, compared to nationwide coverage of over 98%.⁶ Many Tribal areas have even lower rates. For example, in the Navajo Tribal lands, the most populous Tribal lands with over 197,000 residents, wireless broadband services are available to only 53%.⁷ Mobile voice services – using either current or previous generation technologies – cover only 96% of the population on Tribal lands, while the nationwide population coverage rate is approaching 100%.⁸ On Tribal lands, mobile voice services are completely unavailable to almost 44,000 persons where they live and over more than 30,000 square miles.⁹

4. These numbers have particular relevance considering that there are limited alternative means of communication on Tribal lands. Telephone penetration rates are significantly lower than the nationwide rate, as is access to fixed terrestrial broadband services. The most recent analyses prepared by Commission staff show that, although the national rate of wireline and wireless telephone subscribership was 97.6%, only 67.9% of Native American households on Tribal lands had telephone service.¹⁰ Some Tribal areas had significantly lower subscribership rates than the national rate of 67.9%.¹¹ For example, the Navajo lands had a subscribership rate of only 37.4%.¹² Further, coverage rates for fixed terrestrial broadband services are also significantly lower than nationwide averages. Ninety-five percent of the U.S. population as a whole lives in housing units with access to terrestrial, fixed broadband infrastructure,¹³ and approximately two-thirds of all households nationwide subscribe to such services.¹⁴ In contrast, the data that exists on broadband deployment in Tribal lands suggest that fewer than 10% of residents on Tribal lands have terrestrial broadband available.¹⁵

⁶ These coverage figures are Commission staff estimates based on American Roamer database for 3G technologies (EVDO, EVDO Rev A, and UMTS/HSPA), January 2011. Population figures are sourced from the 2000 Census. As the *National Broadband Plan* noted, “American Roamer reports *advertised* coverage as reported by many carriers who all use different definitions of coverage.” Connecting America: The National Broadband Plan, prepared by the staff of the Federal Communications Commission, March, 2010 (“*National Broadband Plan*”) at 39. As a consequence, the data from American Roamer may overstate the coverage actually experienced by consumers.

⁷ See National Broadband Map, <http://www.broadbandmap.gov/summarize/native-nations/navajo-nation> (accessed February 28, 2011).

⁸ These figures are estimates by Commission staff based on 2G (CDMA, GSM/TDMA, and iDEN) and 3G (EVDO, EVDO Rev A, and UMTS/HSPA) technologies from the American Roamer database, January 2011. Population figures are sourced from the 2000 Census. Estimates indicate that 99.8% of POPS have access to 2G digital voice technologies. These estimates are for availability of service and do not reflect data on actual subscribership.

⁹ These figures are estimates by Commission staff based on 2G and 3G technologies from the American Roamer database, January 2011.

¹⁰ Telephone Subscribership on American Indian Reservations and Off-Reservation Trust Lands, Federal Communications Commission, May 2003, at 1 (“*Telephone Subscribership Report*”). The *Telephone Subscribership Report* uses 2000 decennial census long form information. See also Trends in Telephone Service, Federal Communications Commission, September 2010, at 16-4 (Table 16.2 provides a comparable nationwide number).

¹¹ *Telephone Subscribership Report* at 6-11.

¹² *Id.* at 6. Navajo lands include the Navajo Nation Reservation and Off-Reservation Trust Land.

¹³ *National Broadband Plan* at 20.

¹⁴ John Horrigan, *Broadband Adoption and Use in America*, at 13 (OBI Working Paper No. 1, 2010).

¹⁵ See Prepared Remarks of Federal Communications Commission Chairman Julius Genachowski, National Rural Education Technology Summit, National Museum of the American Indian, Washington, D.C., July 21, 2010; see (continued....)

B. Commission Efforts to Promote Connectivity and Wireless Services in Tribal Areas

5. The Commission has adopted a range of programs intended to promote access to wireless radio and other communications services in Tribal areas. These include the Commission's Enhanced Lifeline Assistance and Enhanced Link Up Support programs for Tribal lands, which constitute the universal service low-income program.¹⁶ The enhanced Lifeline program provides eligible low-income consumers living on Tribal lands with discounts of up to \$35 per month on basic monthly telephone service.¹⁷ As a result, depending on current rates, eligible subscribers on Tribal lands may receive basic local phone service for as little as \$1 a month. The enhanced Link Up program provides eligible low-income consumers residing on Tribal lands with a discount of up to \$100 on initial installation or activation of a wireline or wireless telephone for the primary residence.¹⁸ The programs have had, and continue to have, a tremendous impact for consumers on Tribal lands. According to an analysis prepared by the Census Bureau, the telephone penetration rate on Tribal lands was 47% in 1990.¹⁹ The most recent data indicates that the penetration rate on Tribal lands had increased to 67.9%.²⁰ We attribute this positive trend, in part, to the Lifeline and Link Up programs and other universal service programs. Other federal agencies also administer programs that can provide communications-related assistance to Tribal communities, such as the Community Connect program of the Department of Agriculture and the Community Technology Center grants awarded by the Department of Education.

6. In an effort to provide incentives for wireless providers to serve individuals living on Tribal lands, the Commission established its Tribal lands bidding credit program in 2000.²¹ Tribal lands bidding credits are available to winning bidders in Commission auctions for spectrum licensees who deploy facilities and make service available to federally-recognized Tribal areas that have a wireline telephone subscription or penetration rate equal to or below 85 percent.²² Qualifying winning bidders are entitled to discounts on their winning bids to help offset some of the costs of deploying communication services in these underserved locations. The Commission made adjustments to the Tribal lands bidding credit rules in 2004, increasing the amount of credit available and expanding the number of Tribal areas potentially

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also *National Broadband Plan* at 23. This number may reflect low adoption rates as well as low penetration rates. The recently-released National Broadband Map provides broadband availability data for certain individual Tribal lands. See <http://www.broadbandmap.gov/native-nations>.

¹⁶ Eligible low-income consumers are also eligible for Toll Limitation Service support, which reimburses eligible telecommunications carriers for providing toll blocking and toll control at no cost to the consumer. Currently, the participation rate for the low-income program is approximately 36% of eligible households. This figure includes low-income households both on and off Tribal lands. See Federal-State Joint Board on Universal Service, *Recommended Decision*, FCC 10J-3 at 22 ¶ 59. More information about the Enhanced Lifeline and Enhanced Link Up programs is available on the Commission's website at: <http://www.fcc.gov/indians/>.

¹⁷ 47 C.F.R. § 54.403.

¹⁸ 47 C.F.R. § 54.411. The Link Up program also allows eligible low-income consumers to pay the remaining amount they owe on a deferred schedule, interest free, and with some limitations imposed. See 47 C.F.R. § 54.411(a)(2).

¹⁹ Bureau of the Census, *Housing of American Indians on Reservations – Equipment and Fuels*, Statistical Brief, SB/95-11 (1995).

²⁰ *Telephone Subscribership Report*.

²¹ Extending Wireless Telecommunications Services to Tribal lands, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 11,794 (2000).

²² Extending Wireless Telecommunications Services to Tribal lands, *Third Report and Order*, 19 FCC Rcd 17,652 (2004).

eligible for Tribal lands bidding credit claims.²³ It also adopted a revised bidding credit formula at that time, in order to increase the bidding credit limit and further mitigate the economic risks associated with deploying service in Tribal areas. Since the program's inception in 2000, Tribal lands bidding credits have been available in 32 of the Commission's wireless auctions. In those auctions, a Tribal land bidding credit was available for as many as 18,791 licenses. The Commission has received initial requests for the credit on 60 applications. Of those 60 applications, 16 have fully complied with the Commission's rules on securing and submitting the required certifications,²⁴ and have been awarded the bidding credit.²⁵ The 16 applications were submitted by eight discrete applicants. Those Tribal lands bidding credits awards have involved a total of 51 geographic area licenses, with the aggregate amount of credits awarded to date under this program totaling \$8,871,213.00.

7. Consistent with the recommendations of the *National Broadband Plan*, the Commission has undertaken initiatives to promote greater use of spectrum over Tribal lands.²⁶ As part of our work on the Spectrum Dashboard, which allows the public to review how spectrum bands are allocated and for what uses, we are evaluating a potential search function to identify spectrum licensed on federally recognized Tribal lands. The *National Broadband Plan* also recommends that any future spectrum utilization studies identify Tribal lands as distinct entities.²⁷

8. The Commission has also taken action to spur further development and deployment of opportunistic spectrum uses and to make unused spectrum in the TV bands available for unlicensed broadband and wireless devices. The Commission has resolved on reconsideration certain issues concerning this unused spectrum, sometimes referred to as "white spaces."²⁸ In doing so, the Commission modified its former prohibition on the use of TV band devices in border areas with Canada and Mexico, which include Tribal lands. The Commission determined that this prohibition was unnecessary because TV stations in Canada and Mexico could be protected through their inclusion in the TV bands device database.²⁹ This decision will promote innovative uses of spectrum white spaces in Tribal areas.

9. Despite these important efforts and advances, our deep concern about the lack of wireless services on Tribal lands requires us to develop new mechanisms to foster increased access to wireless services for members of Tribes and other residents of underserved Tribal lands.

III. DISCUSSION

10. Mindful of our overall policy goals, we seek comment on a number of suggested approaches to promote improvements in the availability of communications services on Tribal lands, in part by considering Tribal proposals that would provide additional opportunities for greater access by Tribes to

²³ *Id.*, 19 FCC Rcd at 17,657-59 ¶¶ 10-13; 17-18. The Commission initially required that eligible Tribal areas have a subscription or penetration rate equal to or below 70 percent, but subsequently raised this penetration rate to the current 85 percent in 2004.

²⁴ See 47 C.F.R. § 1.2110(f)(3)(ii)(A).

²⁵ The remaining 44 license applications were processed and granted after the applicants withdrew their intention to seek Tribal lands bidding credits.

²⁶ *National Broadband Plan* at 97.

²⁷ *Id.*

²⁸ Unlicensed Operation in the TV Broadcast Bands; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, *Second Memorandum Opinion and Order*, FCC 10-174 at 51-52 ¶¶ 138-141 (2010).

²⁹ *Id.* at 52 ¶ 141.

spectrum over Tribal lands. Three of the five proposals we discuss today could create new opportunities for Tribes to gain access to spectrum through Wireless Radio Services licenses. The other two proposals are designed to create new incentives for licensees to deploy wireless services on Tribal lands. This Notice seeks comment on the following:

- New spectrum access opportunities.
 - A proposal to expand the current Tribal licensing priority to Wireless Radio Services, creating opportunities for access to Wireless Radio Services licenses not yet assigned;
 - A Tribal proposal to utilize the power of secondary markets, by creating a formal negotiation process under which Tribes could work with incumbent wireless licensees to bargain in good faith for access to spectrum over unserved or underserved Tribal lands;
 - A Tribal proposal to use spectrum lying fallow through an innovative build-or-divest process that would allow Tribes to build out in areas where licensees have met their construction requirement, but are not serving the Tribal lands within their service areas.
- Service deployment incentives.
 - A proposal to build on the Commission's previous work in the rural context to establish a Tribal lands construction safe harbor for wireless service providers;
 - A proposal to make modifications to the Tribal lands bidding credit.

11. We contemplate extending any programs, if adopted, to federally-recognized American Indian Tribes and Alaska Native Villages and seek comment on extending eligibility for these programs to entities owned and controlled by such Tribes. In addition, we seek comment on the appropriate definitions of Tribal lands and on the specific wireless services and Commission licensees to which all of these proposals could apply.

12. In considering several processes by which Tribes could gain access to spectrum over unserved or underserved Tribal lands, we note that the *National Broadband Plan* suggested that “[i]ncreasing Tribal access to and use of spectrum would create additional opportunities for Tribal communities to obtain broadband access.”³⁰ In addition, the proposals we discuss today are consistent with the *National Broadband Plan*'s recommendations that we consider extending a Tribal licensing priority to wireless services, developing rules for re-licensing unused spectrum to Tribes, and encouraging use of secondary market mechanisms to facilitate deployment of services to unserved or underserved Tribal areas.³¹

13. These proposals to provide new opportunities for Tribal access to spectrum originated in Tribal submissions relating to development of the *National Broadband Plan* and have been amplified in the context of subsequent proceedings we have initiated to consider the *Plan*'s recommendations. The record thus developed indicates that certain Tribal lands have historically been left behind in the construction of infrastructure critical to communications services.³² More specifically, there are assertions in the record that many providers have not deployed wired services into Tribal lands and that there are instances where wireless providers have failed to build facilities on Tribal lands or have not

³⁰ *National Broadband Plan* at 97.

³¹ *Id.* at 97-98.

³² December 2009 *Ex Parte* Joint Comments at 21.

marketed service to Native Americans.³³ The record also indicates that one path to successful deployment of services on Tribal lands is through Tribal engagement in direct provisioning of services.³⁴ Some have suggested that underutilized spectrum on Tribal lands may represent an “untapped resource” that could be key to improving service (including broadband service) to Tribal consumers, but have observed that under current policies, Tribes face substantial obstacles obtaining spectrum access.³⁵

14. The processes we discuss below to provide new opportunities for Tribes to seek access to spectrum would aim to take into account conditions that have led to the unavailability of adequate service on some Tribal lands. We seek comment generally on those conditions and on whether the various approaches that have been suggested may help address them and achieve real benefits for Tribal consumers of wireless services. The proposals for spectrum access in general seek to make underutilized spectrum more available for use in unserved and underserved Tribal lands. In this regard, we note that proposals for Tribal access to spectrum may facilitate our broad goal of promoting increased use of unused or underutilized spectrum through secondary market mechanisms.³⁶ Providing for additional mechanisms with respect to spectrum access in licensed services over unserved or underserved Tribal lands could significantly benefit those seeking such access in that there is likely to be a mature ecosystem for devices and equipment where spectrum has already been licensed, so that new licensees and new customers would be able to find and purchase existing equipment in the marketplace. Ready availability of devices and equipment can promote faster and more economical buildout and service than would be possible using spectrum where new services are being deployed. We seek comment on the potential benefits of promoting additional mechanisms for Tribal access to licensed spectrum.

15. The record provides evidence that funding is a critical problem for deployment of infrastructure on Tribal lands where often there is no private sector business case for such deployment.³⁷ We have recently proposed the creation of the Mobility Fund within the Universal Service high cost program to provide one-time support for the deployment of current generation or better mobile wireless service where such services are not now available.³⁸ In addition, we proposed to address the details of providing Mobility Fund support to Tribal lands on a separate track to be sure that there is time for adequate coordination to enhance the benefits that may result from such a program.³⁹ If adopted, the Mobility Fund may be a potential source of funds for build out on unserved or underserved Tribal lands, but, as proposed, those that wish to seek Mobility Fund support would first need access to spectrum

³³ Native Public Media and National Congress of American Indians, Joint Comments, WT Docket No. 10-208, Dec. 16, 2010, at 5.

³⁴ NPM-NCAI Joint Comments at 7.

³⁵ December 2009 *Ex Parte* Joint Comments at 19.

³⁶ See generally Principles for Promoting Efficient Use of Spectrum By Encouraging the Development of Secondary Markets, *Policy Statement*, 15 FCC Rcd 24,178 (2000) (“*Secondary Markets Policy Statement*”); Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20,604 (2003) (“*Secondary Markets First Report and Order*”), *Erratum*, 18 FCC Rcd 24,817 (2003). See also Promoting More Efficient Use of Through Dynamic Spectrum Access Technologies, *Notice of Inquiry*, FCC 10-198 ¶¶ 38-41 (2010) (seeking comment on possible revisions to the Commission’s secondary market rules to facilitate use of dynamic spectrum access technologies).

³⁷ NPM-NCAI Joint Comments at 7. See also GAO Telecommunications Report at 5.

³⁸ Universal Service Reform; Mobility Fund, *Notice of Proposed Rulemaking*, FCC 10-182 (2010).

³⁹ *Id.* at ¶ 33; see also Connect America Fund, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, FCC 11-13 at 100-01, 105-06 ¶¶ 302-305, 320 (2011).

suitable for providing 3G or better service.⁴⁰ Therefore, the availability of new opportunities for Tribes to access spectrum may actually open up new sources of support for infrastructure deployment. Without such access, Tribes would not be able to directly use the proposed Mobility Fund.⁴¹

16. Finally, we note that there is not likely to be one answer to the problem of improving the availability of communications services on Tribal lands. As some have noted in the record, a “one-fits-all model will not be successful.”⁴² Some Tribes may prefer to work with licensees to speed construction and service on their Tribal lands. Accordingly, we seek comment below on how proposals for Tribal access to spectrum can also provide incentives for construction without direct Tribal access to spectrum. For example, in discussing the possibility of re-licensing spectrum over unserved or underserved Tribal lands through a build-or-divest process, we seek comment on providing a period during which the licensee could construct and provide service to specific Tribal lands. We invite comment on whether such a process may spur better coordination among Tribes and licensees. In this vein, we also make proposals below to provide new incentives for construction on Tribal lands by non-Tribal Wireless Radio Services licensees. We seek comment on all these proposed approaches.

A. Tribal Lands and Wireless Radio Services Subject to Proposals

17. At the outset, we seek comment on appropriate definitions of “Tribal lands” for the purposes of the various proposals contained in this Notice. We also seek comment on which Wireless Radio Services should be subject to these proposals.

1. Tribal Lands

18. We seek comment on how the term “Tribal lands” or “Tribal land” should be defined for the purposes of the proposals discussed in this Notice. We propose to define Tribal land as “any federally recognized Indian tribe’s reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.” This is the same definition of Tribal lands that we use in defining the term “qualifying Tribal land” for the purposes of the Tribal lands bidding credit program in § 1.2110(f)(3)(i) of the Commission’s rules.⁴³ We note that the Commission is also examining other possible definitions in the Notice of Inquiry on tribal issues being adopted concurrent with this Notice.

2. Wireless Radio Services Subject to Tribal Lands Programs

19. We propose that all Wireless Radio Services that are licensed on a geographic area basis would be subject to the proposals discussed in this Notice.⁴⁴ These services include: 700 MHz; Advanced Wireless Services; Narrowband and Broadband Personal Communications Service; Broadband Radio Service and Educational Broadband Service; 2.3 GHz Wireless Communications Service; 1670-1675 MHz; 1392-1395 MHz; 1432-1435 MHz; and 800 MHz and 900 MHz Specialized Mobile Radio.

⁴⁰ *Id.* at 103 ¶ 311.

⁴¹ We note that licensees operating on Tribal lands might still be able to benefit from Mobility Fund support.

⁴² December 2009 *Ex Parte* Joint Comments at 7.

⁴³ 47 C.F.R. § 1.2110(f)(3)(i) states that:

Qualifying tribal land means any federally recognized Indian tribe’s reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments, that has a wireline telephone subscription rate equal to or less than eighty-five (85) percent based on the most recently available U.S. Census Data.

⁴⁴ *See* 47 C.F.R. § 1.907.

Licensees in the 800 MHz Cellular service are subject to licensing rules that permit third parties to acquire and provide service to unserved areas. Accordingly, 800 MHz Cellular licenses and other site-based services would not be subject to these proposals. We invite comment on whether each of these services should be subject to the proposals described above. We also seek comment specifically on whether to subject the Educational Broadband Service (“EBS”) to these changes at this time. We note that the last opportunity to file for new EBS stations was in 1995, and the Commission has sought comment on developing a new mechanism for assigning unassigned EBS spectrum.⁴⁵ In connection with that proceeding, Native Public Media proposed modifying the EBS eligibility rules to explicitly make “Indian tribes” and “Tribal Governments” eligible to apply for EBS spectrum.⁴⁶ Native Public Media also proposes to give tribal entities priority access to EBS spectrum.⁴⁷ The role of Tribes is an open issue in the ongoing EBS proceeding.⁴⁸ Moreover, no mechanism currently exists for assigning spectrum in that service. Accordingly, we ask commenters to address whether we should either proceed with including EBS among the Wireless Radio Services subject to Tribal lands programs or await Commission action addressing Tribal issues in the EBS proceeding. We seek comment on whether to the extent we use different licensing models for certain services they should be subject to different treatment or exclusion from any of the proposals we make today. Are there other wireless services that should be included?

20. We propose that, should the Commission decide in the future to allocate or establish new wireless services, those services would be subject to any new rules that might be established in this proceeding. We seek comment on this proposal.

B. Definitions for Proposals on Tribal Access to Spectrum

21. This Notice discusses three proposals for processes that would provide new opportunities for Tribes to gain access to spectrum through Wireless Radio Services licenses. In particular we propose a Tribal licensing priority and discuss Tribal suggestions for additional processes that could provide a path by which Tribal entities could gain access to spectrum licenses with respect to geographic areas covering their Tribal lands that are unserved or underserved as these terms are defined for these purposes.

22. Before discussing the details of each of these spectrum access proposals we address here definitions to assist in the potential implementation of all three processes as well as the statutory and legal bases supporting these approaches. Specifically, below we propose definitions for (1) qualifying Tribal entities eligible for these spectrum access opportunities, (2) unserved and underserved Tribal lands, and (3) the boundaries of the geographic area within a license to which the proposals would apply.

1. Eligibility and Legal Authority for Tribal Access to Spectrum Opportunities

23. We propose that a Tribal licensing priority should be available to qualifying Tribal entities as we define them below and similarly seek comment on the application of this definition to the Tribal proposals for spectrum access processes. A qualifying Tribal entity for these purposes would be an entity designated by the Tribal government or governments having jurisdiction over particular Tribal land for which the spectrum access is sought. We propose that only the following may be designated as qualifying Tribal entities: (1) Tribes; (2) tribal consortia; (3) entities that are more than 50 percent owned and

⁴⁵ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling*, 23 FCC Rcd 5992 (2008).

⁴⁶ See Reply Comments of Native Public Media, WT Docket No. 03-66, Oct. 22, 2008, at 3.

⁴⁷ *Id.*

⁴⁸ WT Docket No. 03-66.

controlled by a Tribe or Tribes. This is consistent with Commission rules governing the Tribal priority in the broadcast radio licensing context.⁴⁹ As discussed more fully below, we propose to use principles of control similar to the principles set forth in our Part 1 rules on attribution for purposes of determining eligibility for designated entity benefits.⁵⁰ We seek comment on this definition. In particular, we seek comment on whether we should limit eligibility for these programs to the Tribal entities that have a geographical connection to the area for which they seek spectrum access.

24. In proposing these eligibility requirements, we recognize that the legal foundation for providing opportunities to Tribes for access to spectrum is based on the federal government's trust relationship with Tribal governments. When we established the broadcast Tribal priority, we observed that such a licensing preference would "advance the Commission's longstanding commitment, in accordance with the federal trust relationship, 'to work with Indian Tribes on a government-to-government basis ... to ensure, through its regulations and policy initiatives, and consistent with Section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to communications services.'"⁵¹ Pursuant to that commitment, the Commission has recognized "the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership."⁵² Following our reasoning in the *Rural Radio Report and Order*, the new spectrum opportunities we discuss for wireless licensing would not be extended to individual members of Tribes, or to entities owned by individuals without ownership by the Tribes themselves. This is consistent with the Commission's interests in helping promote tribal self-sufficiency and economic development, and endeavoring to ensure that Tribes and tribal communities have adequate access to communications services.⁵³ The Commission's policy of looking to tribal governments, rather than individual members of Tribes, to determine communications policies that best serve the needs of tribal communities recognizes that Tribes and their governments are primarily concerned with the needs of all tribal citizens.⁵⁴ We believe therefore that eligibility for the proposed opportunities should be limited to those entities that are majority owned by Tribes or tribal entities.

25. The unique trust relationship between the Commission and Tribes provides a legal basis for the existing Tribal priority for broadcast radio licenses.⁵⁵ We believe that this trust relationship likewise justifies extension of the Tribal priority to wireless licenses and seek comment on its application to the other potential spectrum access opportunities discussed here. Establishing processes that would provide Tribes with increased opportunities for access to spectrum over unserved or underserved Tribal lands would also be consistent with a number of public interest objectives identified in section 309(j) of the Act, including the objective of section 309(j)(3)(A) to ensure "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas . . ." and that of Section 309(j)(3)(D) of promoting "efficient and intensive use of the electromagnetic spectrum."⁵⁶ The Tribal priority and other spectrum access proposals described below would further

⁴⁹ 47 C.F.R. § 73.7000.

⁵⁰ See paragraph 23, *infra*; see also Appendix A (proposed rules).

⁵¹ See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, *First Report and Order and Further Notice of Proposed Rule Making*, 25 FCC Rcd 1583, 1588 ¶ 9 (2010) ("*Rural Radio Report and Order*"), citing *Tribal Policy Statement*, 16 FCC Rcd at 4079.

⁵² *Id.*

⁵³ *Id.*, 25 FCC Rcd at 1595-96 ¶ 25.

⁵⁴ *Id.*

⁵⁵ *Id.* See also *Tribal Policy Statement*, 16 FCC Rcd at 4080-82.

⁵⁶ 47 U.S.C. §§ 309(j)(3) & (4).

section 307(b)'s mandate to "make such distribution of licenses ... among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service" with regard to Tribal lands.⁵⁷ We also believe that these proposals would satisfy the relevant constitutional analysis because any proposed benefits would be granted to Tribes and their members "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the [Bureau of Indian Affairs] in a unique fashion."⁵⁸

26. While the Commission utilizes different processes to apply the requirements of section 307(b) of the Communications Act in licensing various broadcast services and in licensing Wireless Radio Services,⁵⁹ both the existing Tribal priority and the spectrum access proposals we discuss here are intended to achieve similar goals of extending service to those on Tribal lands. We seek comment on the constitutional and statutory bases for adoption of a Tribal priority for Wireless Radio Service licenses. We also invite comment on whether these authorities would support adoption of the Tribal proposals to provide new spectrum access opportunities and whether any other constitutional or statutory considerations should be addressed in our analysis of those proposals.

27. We note that the existing Tribal priority for broadcast licensing evaluates the eligibility of qualifying entities for such a benefit using the Part 73 attribution rules for determining ownership and other interests in broadcast licensees.⁶⁰ For determining the eligibility for a Tribal priority for Wireless Radio Service licenses, we recognize the need to also adopt attribution rules that will assure that the priority goes only to qualified Tribal entities. We therefore propose to base any determinations of control using the existing attribution rules that we currently apply in the context of making determinations concerning eligibility for designated entity benefits for licenses assigned by auction as provided in part 1, subpart Q of the Commission's rules.⁶¹ Using policies that are already being utilized in the part 1, subpart Q attribution rules for purposes of determining eligibility for a Tribal priority for Wireless Radio Service licenses will ensure that applicants and licensees will be subject to uniform requirements for the calculation of ownership, control and affiliation interests. We seek comment on whether attribution rules for determining eligibility as a qualifying Tribal entity should take into account agreements between Tribal entities and non-Tribal entities that may give rise to attribution of interests under the existing

⁵⁷ 47 U.S.C. § 307(b). See also *Rural Radio Report and Order*, 25 FCC Rcd at 1590 ¶ 12.

⁵⁸ *Morton v. Mancari*, 417 US 535, 554 (1974). The Supreme Court went on to observe that the preference in question "is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Id.* at 554 n.24. As discussed below, the proposed Tribal priority will apply only to Tribes or entities that are majority owned by one or more Tribes.

⁵⁹ For example, in the licensing process for new AM broadcast stations, applicants' proposals are subject to a threshold determination under 307(b) and may, in certain cases, qualify for a dispositive preference relative to other mutually exclusive station proposals. If more than one applicant proposes the community that prevails under the 307(b) analysis, those applicants' mutually exclusive applications would be resolved through competitive bidding. Where only one applicant proposes the community receiving the dispositive Section 307(b) preference, its application continues to the next stage of the licensing process, and thus it may be awarded an authorization by virtue of the Section 307(b) determination rather than through competitive bidding. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15,920, 15,964-65 (1998), *on recon.*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *on further recon.*, Memorandum Opinion and Order, 14 FCC Rcd 14,521 (1999).

⁶⁰ See *Rural Radio Report and Order*, 25 FCC Rcd 1583, 1596 ¶ 26 and n.70, citing 47 C.F.R. § 73.3555 and Notes 1 and 2.

⁶¹ 47 C.F.R. § 1.2110; see also Appendix A, proposed § 1.1002.

subpart Q rules, such as management and service agreements.⁶² Should there be any exclusions provided in the attribution rules for this purpose based upon any unique ownership and control issues associated with Tribal governments and Tribal entities? We seek comment on this approach for our proposed Tribal priority as well as in connection with the Tribal proposals for other spectrum access processes.

2. Defining Unserved or Underserved Tribal Lands

28. We propose that a Tribal priority would be available only with respect to Tribal land areas that are “unserved or underserved” and seek comment on using the same definition in considering the Tribal proposals for spectrum access opportunities. We propose to define as “unserved or underserved” those Tribal lands where there is Wireless Radio Services coverage to not more than 65 percent of the population of the Tribal land area. We invite comment on this proposed definition and seek comment on alternatives.

29. By way of background, the Commission issues wireless licenses for a defined license term to cover either a geographic area or a specific site. Wireless Radio Services, such as Broadband PCS, that are licensed on a geographic area basis are generally subject to population-based standards for meeting applicable construction requirements. For example, Broadband PCS licensees with 30 megahertz block licenses must provide a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within ten years of being licensed.⁶³ If a Broadband PCS licensee fails to meet either construction benchmark within those time periods, the license terminates.⁶⁴ The Commission has used other forms of construction requirements for wireless licenses in other services. For example, licenses in the Advanced Wireless Services are subject to a “substantial service” requirement.⁶⁵ In addition, certain 700 MHz Band licenses are subject to stringent “keep-what-you-use” construction requirements.⁶⁶ Construction requirements are intended to ensure that licensees make available a certain minimum level of service to the public or face the loss of their licenses if they fail to do so.⁶⁷ In all of these services, geographic area-based licensees can satisfy construction requirements without necessarily constructing a network capable of providing service to all residents of their license area, leaving some areas, possibly including Tribal lands, with only minimal levels of service or no service at all.

30. Each of the proposals for spectrum access opportunities we discuss in this Notice is intended to create greater incentives for wireless deployment in such unserved or underserved areas. For purposes of the processes we discuss today, we believe that defining as unserved or underserved those Tribal lands with Wireless Radio Services coverage to not more than 65 percent of the population will identify the places most in need of additional efforts to expand the availability of wireless services. We note that for purposes of our Tribal Land Bidding Credit program, we use a threshold wireline telephone

⁶² 47 C.F.R. § 1.2110(c)(2).

⁶³ 47 C.F.R. § 24.203.

⁶⁴ *Id.*

⁶⁵ 47 C.F.R. § 27.14(a) (“‘Substantial service’ is defined as service which is sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal.”).

⁶⁶ See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report and Order*, 22 FCC Rcd 15,289, 15,348-55 ¶¶ 153-175 (2007).

⁶⁷ The goals of the construction requirements also include preventing the stockpiling and warehousing of spectrum and promoting investment in, and deployment of, new technologies. *Rural Radio Report and Order*, 25 FCC Rcd at 1595-96 ¶¶ 25-27.

subscriber rate of 85 percent.⁶⁸ Should we define unserved or underserved as coverage by Wireless Radio Services to less than or equal to 85 percent of the population as used in the context of our Tribal Land Bidding Credit program? Alternatively should we define unserved or underserved as coverage that is a specified percentage below some other standard of coverage? We seek comment on these alternatives for defining unserved or underserved.

31. Some wireless services are licensed on a site-specific basis, such as 800 MHz cellular. Such site-based licensees are required to meet applicable technical standards by maintaining certain levels of signal strength throughout their entire service contours. Thus, unserved or underserved areas do not arise within the contours of licenses that are authorized on a site-specific basis. For this reason, the Tribal priority and other spectrum access opportunities described below would not apply to wireless services that are licensed on a site-specific basis.⁶⁹

3. Defining Geographic Area for Which Tribal Access to Spectrum Opportunities May be Available

32. We propose that a Tribal priority would be available with respect to a geographic area defined by the boundaries of the Tribal land associated with the Tribal entity seeking the access. We seek comment on this proposal. More specifically, we seek comment on the interrelationship of these proposed boundaries with our proposal that the Tribal priority would be available only with respect to Tribal land areas that are unserved or underserved as discussed above. To the extent that there is some coverage within the Tribal land area, should the boundaries for the Tribal spectrum access be defined by the extent of that service? We also seek comment on applying this definition to the Tribal proposals for spectrum access opportunities we discuss below.

33. We also seek comment on whether the boundaries of the geographic area for a Tribal priority should include unserved or underserved near-reservation areas and other areas beyond the boundaries of Tribal lands? Would this assist in making wireless services available to Tribal members that may reside in areas just outside of a tribal reservation? If such near-reservation areas were included, we propose that any such areas would be comprised of U.S. Census block areas. Using Census block boundaries will provide more certainty for all parties and will allow the Commission to more easily administer such licenses in its existing licensing systems. Should we impose a limit on the amount of such near-Tribal land areas that might be included? For instance, should such areas be limited to comprising 25 percent or less of the total geographic area for which spectrum access is sought? We seek comment on whether we should include unserved or underserved near-reservation areas in defining the relevant geographic area for the Tribal proposals for spectrum access processes we discuss below.

34. Finally, we seek comment on whether carving out a geographic area based on our proposed boundaries would give rise to coordination and interference issues with neighboring licensees. How can we address any technical, interference or other issues that may be raised by this proposal?

C. Tribal Licensing Priority for Unassigned Wireless Radio Services Licenses

35. We propose to establish a licensing priority that would be applicable to licenses for fixed and mobile wireless services and available to qualifying Tribal entities for unserved or underserved Tribal lands as defined above, where such Tribal lands are within the geographic area covered by an unassigned Wireless Radio Services license. In offering this proposal we note the significant record support for an expanded Tribal spectrum priority, which the National Broadband Plan recommended for the

⁶⁸ See 47 C.F.R. § 1.2110(f)(3)(i).

⁶⁹ Note that this does not mean that cellular service is ubiquitous, but that unserved areas are outside the service area of any licensee.

consideration of the Commission.⁷⁰ In making this proposal, we draw upon our recent adoption of a Tribal priority in the context of licensing of broadcast radio services.⁷¹ Under that policy, federally recognized Tribes, Tribal consortia, and entities that are 51 percent or more owned by a Tribe or Tribes, are entitled to a priority under Section 307(b) of the Communications Act of 1934, as amended, when proposing FM allotments, as well as applying for AM and noncommercial educational FM stations, that would primarily serve Tribal lands.⁷² Where a federally recognized American Indian Tribe or Alaska Native Village entity applies for or proposes a broadcast station or allotment and meets the requirements for a Tribal priority, its application or proposal in most cases will receive a dispositive preference under section 307(b), and thus may prevail based on a threshold determination under that statutory provision.⁷³ In the case of a proposal for new AM commercial service, for example, such a dispositive preference would result in the application proceeding to processing without competitive bidding. In the case of proposals for new noncommercial educational FM stations, the dispositive preference would result in the tentative selection of the applicant receiving the Tribal priority, without a fair distribution analysis or point system comparison.

36. We seek comment on whether making available a Tribal priority as described in this section would facilitate access by Tribal entities to spectrum over Tribal lands. We also seek comment on whether any aspect of our proposed definitions above should be modified specifically with respect to their application to our proposed Tribal licensing priority.

37. Below, we seek comment on how to address a number of issues with respect to implementation of such a Tribal priority in the context of Wireless Radio Services licenses.

1. Process and Licensing Framework for Awarding Tribal Priority

38. We anticipate that we would establish a process for licensing wireless services pursuant to a Tribal priority that would generally avoid the opportunity for mutually exclusive applications. While section 309(j)(1) of the Communications Act requires the Commission to use auctions whenever it accepts mutually exclusive applications for an initial license, section 309(j)(6)(E) provides that the auction requirement of section 309(j)(1) does not relieve the Commission of the obligation in the public interest to use various means to avoid mutual exclusivity.⁷⁴ Section 309(j)(6)(E) provides that the Commission may use engineering solutions, negotiation, threshold qualifications, service regulations and other means to avoid mutual exclusivity in licensing processes where it determines that it is in the public interest to do so.⁷⁵ Because we anticipate that there generally would be only a single qualifying Tribal entity with respect to any particular Tribal land area, we believe that the public interest would be served by establishing a licensing scheme that would avoid mutually exclusive applications. However, should mutually exclusive applications from Tribal entities be accepted under any Tribal priority licensing

⁷⁰ See, e.g., Native Public Media/National Congress of American Indians November 2009 Joint Comments at 19; December 2009 *Ex Parte* Joint Comments at 19. See also *National Broadband Plan* at 97.

⁷¹ *Rural Radio Report and Order*, 25 FCC Rcd 1583 (establishing, *inter alia*, a Section 307(b) priority for Native American and Alaska Native Tribal groups serving Tribal lands).

⁷² 47 U.S.C. § 307(b); see also *Rural Radio Report and Order*, 25 FCC Rcd 1583.

⁷³ *Id.*

⁷⁴ 47 U.S.C. §§ 309(j)(1), (j)(6)(E).

⁷⁵ 47 U.S.C. § 309(j)(6)(E); see also *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997); *Benkelman Telephone Co. v. FCC*, 220 F.3d 601 (D.C. Cir. 2000).

process we establish, we propose to resolve them through competitive bidding.⁷⁶ We seek comment on this analysis.

39. In particular, we seek comment on alternative ways to provide opportunities for eligible Tribal entities to file applications seeking a Tribal priority for licenses covering specific Tribal lands within geographic licensing areas in established Wireless Radio Services. One approach would be to provide a Tribal priority application window after the Commission has released a Public Notice proposing to offer specific initial licenses in a spectrum auction but before the window for filing auction applications opens. Alternatively, the Commission could provide a Tribal priority application window prior to any announcement of specific licenses to be offered in a spectrum auction. Assuming there is only one Tribal priority application accepted for a particular license, the portion of the license covering the Tribal land would not be offered at auction. We invite comment on the relative merits and drawbacks of these alternative application approaches. In light of data discussed above regarding limited access to communications services in Tribal areas,⁷⁷ we anticipate that, under either approach, the Commission would undertake outreach efforts, in addition to Public Notices, in order to widely disseminate information and maximize opportunities for Tribes to benefit from any new licensing priority program.

40. We anticipate that if a Tribal priority is awarded, the Tribal entity will have to meet all legal, technical and financial requirements to qualify for a license in the specific Wireless Radio Service.⁷⁸ In addition, we propose that all construction and other conditions of the relevant license would apply as if the license were awarded through the process normally applicable for the specific service. We seek comment on these proposals.

D. Tribal Proposals for Processes to Provide Access to Spectrum Licensed to Third Parties

41. The relatively low rate of wireless coverage on Tribal lands suggests that various Commission methods of promoting the deployment of wireless services — including service-specific construction requirements and the secondary markets mechanisms — may not be sufficient to provide the incentives necessary to ensure the provision of wireless services to Tribal lands. These proposals have been crafted to address the unique communications-related circumstances faced by those living and working on unserved and underserved Tribal lands, and do not more generally address issues of spectrum access and secondary markets beyond Tribal lands. We seek any additional information that would help us better understand and address the problems faced by those on Tribal lands in obtaining access to wireless services, and seek comment on all aspects of these proposals. We also invite license holders to comment on reasons that they may not be taking advantage of existing regulatory provisions that enable them to allow other parties to access and use spectrum in areas under their license that they do not expect to use themselves.

⁷⁶ See *supra* note 59.

⁷⁷ See discussion at paragraphs 3 and 4, *supra*.

⁷⁸ 47 U.S.C. §308(a), (b) (written license application required to demonstrate licensee qualifications pursuant to standards set forth in Commission regulations). An entity seeking a Wireless Radio Service license must submit electronically a long-form application (FCC Form 601) and have a complete and accurate ownership disclosure information report (FCC Form 602) on file with the Commission. The information provided by the applicant in its long-form application demonstrates the applicant's ability to comply with the requirements imposed on a licensee in that particular Wireless Radio Service. The qualification requirements for some of the Wireless Radio Services established more recently by the Commission may be found in Part 27 of the Commission's rules. 47 C.F.R. Part 27. An entity seeking to operate a wireless system would also have to ensure that its contemplated operations would meet all applicable service rule requirements, such as interference protection standards, and obligations under the National Environmental Policy Act and other federal statutes.

42. In this section we discuss two proposals offered by Tribes for processes that could provide new opportunities for Tribal access to spectrum for fixed and mobile wireless services that is licensed to third parties. The first of these proposals seeks to address the challenges that Tribes have alleged they have had in encouraging wireless licensees to negotiate potential secondary market transactions involving their licensed spectrum over Tribal lands.⁷⁹ It would create a formal negotiation process through which a Tribe that had been refused good faith negotiations regarding a secondary markets transaction within a wireless licensee's geographic area of license could require a licensee to enter into such negotiations. The second proposal aims to combat the hurdle some Tribes have encountered where wireless licensees holding spectrum over Tribal lands have met their construction requirements, but have not built out networks to provide service to Tribal lands within their geographic area of license.⁸⁰ It would enable a Tribe to require the licensee either to build or to divest spectrum in the relevant geographic area at any time after the licensee has satisfied the construction requirements applicable to the particular license. As discussed above, we are seeking comment on making the two opportunities we describe here available only to qualifying Tribal entities with respect to geographic areas covering Tribal lands that are unserved or underserved as defined above. We seek comment on this proposed application of the definition.

43. One way to implement each of these approaches would be for the qualifying Tribal entities to initiate the specific process for seeking spectrum access with respect to assigned licenses for Wireless Radio Services by the filing of a Notice of Intent with the Commission and service of the Notice on the licensee. Such a Notice of Intent would have to provide the necessary information to demonstrate the prerequisites for the specific process sought to be initiated. That is, we would need information indicating that the filer is a qualifying Tribal entity, as well as information demonstrating that the relevant Tribal land is unserved or underserved in accordance with the definition discussed above, and information defining the geographic boundaries of the area over which spectrum access is sought. We seek comment on using such a Notice of Intent. We also seek comment on providing the existing licensee with thirty days to provide information to rebut the assertion that the Tribal land in question is unserved or underserved. Would such a process for determining whether a Tribal land area meets this service threshold be sufficient?

44. Below, we seek comment on a number of specific issues with respect to implementation of the Tribal proposals for providing spectrum access opportunities through good faith negotiations and build-or-divest processes.

1. Good Faith Negotiations

45. As noted above, the record contains Tribal proposals that we adopt additional mechanisms for taking advantage of the secondary market opportunities to improve service deployment.⁸¹ The proposal for a good faith negotiation process is intended to address difficulties that Tribes have detailed in securing access to spectrum rights held by existing wireless licensees whose licenses cover Tribal land areas. Tribal entities have long argued that they would provide coverage to unserved and underserved Tribal lands if they could get access to the spectrum, but that they have encountered a number of difficulties in initiating and completing such negotiations.⁸²

⁷⁹ Southern California Tribal Chairmen's Association, *Ex Parte* Letter, GN Docket Nos., 09-47, 09-51, 09-137, Feb. 9, 2011.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

46. Under the proposed process, Tribes could leverage existing secondary market post-licensing opportunities to secure access to spectrum over unserved and underserved Tribal lands through license partitioning or through spectrum leasing. These secondary market opportunities could involve leasing all or part of a licensee's spectrum rights or partitioning a geographic portion of a license for assignment to another entity. Robust and efficient secondary markets increase the availability of unused or unneeded spectrum capacity and may enable new users to deploy services where, for a number of possible reasons, the original licensee did not. We seek comment on whether such a good faith negotiations process would help provide Tribes with access to spectrum licensed to other parties and lead to better availability of Wireless Radio Services for consumers on Tribal lands.

47. One way to implement such a proposal would be to create a formal negotiation process that would enable a qualifying Tribal entity to require a licensee to enter into good faith negotiations regarding a secondary markets transaction with respect to any geographic portion of the licensee's license area that is covered by unserved or underserved Tribal lands. We seek comment on whether, if adopted, this process would permit a qualifying Tribal entity to file a Notice of Intent to initiate a good faith negotiations process at any time during the license term, provided that the filing Tribal entity can demonstrate that in connection with a previous attempt by the Tribe to negotiate, the licensee failed to negotiate in good faith. We seek comment generally on such a process and more specifically on whether modifications of any aspect of the generally applicable proposed definitions discussed above should be made. We also seek comment on requiring that a Notice of Intent initiating this process would have to include information about a previous negotiation attempt in which the Tribal entity believes that the licensee did not bargain in good faith. Would such a requirement raise issues regarding confidential or proprietary information? If so, what protections could we establish to address those issues?

48. We also seek comment on what the contours of any formal negotiating process, if adopted, should be. Should the Commission adopt standards similar to those currently employed by the Commission in the context of retransmission consent?⁸³ Under such a standard, to implement the good faith negotiation requirement, we could use a two-part test for good faith.⁸⁴ The first part of the test would consist of a brief, objective list of negotiations standards. Such standards could include: First, a licensee may not refuse to negotiate with a Tribal entity whose Tribal lands are within its service area but to which it has not deployed service. Second, a licensee must appoint a negotiating representative with authority to bargain on partitioning and spectrum leasing issues. Third, a licensee must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations.⁸⁵ Fourth, a licensee may not put forth a single, unilateral proposal. By this, we envision that a licensee would have to be willing to consider and discuss alternative terms or counter-proposals, as it would appear that "take it or leave it" bargaining without consideration of reasonable alternatives could be found to be inconsistent with an affirmative obligation to negotiate in good faith. Fifth, a Tribal entity, in responding to an offer proposed by a licensee, must provide considered reasons for rejecting any aspect of the licensee's offer. Finally, if an agreement is reached, a licensee must agree to execute a written

⁸³ See 47 C.F.R. § 76.65.

⁸⁴ Cf. Implementation of Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, *First Report and Order*, 15 FCC Rcd 5445 (2000) (adopting rules and complaint procedures including a two-part good faith test, which consists of 1) a set of objective standards and; 2) a totality of the circumstances standard, related to the obligation of local broadcasters to negotiate in good faith with multichannel video programming distributors . . . for retransmission consent of their broadcast signals), *amended on reconsideration in part by* Implementation of Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, *Order on Reconsideration*, 16 FCC Rcd 15,599 (2001).

⁸⁵ For example, we could establish a time period for responses by the parties. A licensee might be provided a period of 30 days from the filing of such application to respond to the proponent.

agreement that sets forth the full agreement, between the licensee and the Tribal entity. We seek comment on this potential approach should a formal negotiation process be adopted.

49. Likewise, we seek comment on whether a proposed good faith test should include a totality of the circumstances standard.⁸⁶ This approach would enable a Tribal entity to present facts to the Commission which, even though they do not allege a violation of the objective standards, given the totality of the circumstances constitute a failure to negotiate in good faith. The complainant would bear the burden of proof when making a good faith complaint.

50. We seek comment on the merits and drawbacks of our using such a good faith test for the proposed process. Should good faith negotiations be concluded within any specified time period? If so, what would be a reasonable time period? Should there be a requirement that a Tribe availing itself of the process make a showing that it has the financial wherewithal to fulfill its end of the proposed transaction?

51. We also seek comment on whether there are incentives we could provide for conclusion of a license partitioning or spectrum leasing transaction. For instance, would it be beneficial to such a process if we were to provide any licensee that leases spectrum rights to a qualifying Tribal entity with additional credit reflecting such coverage toward meeting its overall construction requirement for the license? Are there other incentives that might be beneficial?

52. Finally, we seek comment on whether any partitioning or spectrum leasing transaction that may result from a good faith negotiations process would be subject to all of the Commission's rules applicable to such transactions as well as all of the Commission's rules applicable to the relevant Wireless Radio Service, including rules regarding construction requirements.

2. Build-or-Divest Process

53. The record also reflects Tribal proposals that we establish a process by which a qualifying Tribal entity could require a licensee to build or divest a geographic area covering unserved or underserved Tribal lands within its license area.⁸⁷ The notion is that such a process might be available where an existing licensee has satisfied the applicable construction requirements for the license yet Tribal land areas remain unserved or underserved under our proposed definition described above. This proposal is intended to provide Tribal governments with a process under which they could expedite service to their Tribal lands. We seek comment on the efficacy of this approach.

54. We seek comment on the best way to implement such a process if adopted. For example, we seek comment on whether, if adopted, this process would permit a qualifying Tribal Entity to file a Notice of Intent to initiate a build-or-divest process only after the relevant licensee had met the applicable construction requirement. Would such a Notice of Intent for this purpose include, in addition to the information already discussed, the date on which the Commission accepted the licensee's notice of construction demonstrating that it has satisfied its final construction requirement for the license in which

⁸⁶ See note 84, *supra*.

⁸⁷ Native Public Media and The National Congress of American Indians, Joint Comments, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337, July 12, 2010 at 9; Native Public Media and The National Congress of American Indians, Joint Reply Comments, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337, Aug. 11, 2010 at 7; National Tribal Telecommunications Association, Comments, WT Docket No. 10-208, Dec. 15, 2010 at 4; Navajo National Telecommunications Regulatory Commission, Reply Comments, WT Docket No. 10-208, Jan. 18, 2011 at 4; see also *National Broadband Plan* at 98.

the unserved or underserved Tribal land is located?⁸⁸ We also seek comment on what information should be included in a Notice of Intent filed in this context.

55. We seek comment on whether, after the filing of a Notice of Intent by a Tribe initiating a build-or-divest process, if adopted, the licensee should have to indicate whether it would agree (a) to extend coverage to the Tribal land(s), or (b) relinquish its authorization for the unserved or underserved Tribal land within the geographic area of its license. In addition, should the authorization of any licensee that chooses to extend coverage and fails to do so within the time allowed be terminated with respect to the geographic area covered by the unserved or underserved Tribal land? We also seek comment on whether the establishment of a build-or divest process would promote coverage in these areas, and whether the rule should be prospective only or apply to licenses already granted as well.

56. We seek comment on the particular construction or performance requirements that might be imposed on any licensee that opts for extending coverage to unserved or underserved Tribal lands under the build-or-divest process. We would want to establish performance criteria that would reasonably result in timely and meaningful service coverage to unserved or underserved tribal areas, but that also acknowledge the difficulties of deploying facilities in often remote and rural areas.⁸⁹

57. In line with our goal of expediting wireless coverage to unserved and underserved communities, we seek comment on a requirement that a licensee that opts to provide coverage under the build-or-divest process must provide the specified level of service within three years of the filing of a Notice of Intent.⁹⁰ A relatively short period would promote the availability of service to residents of the affected tribal area. Alternatively, given the wide variety of geographic sizes and population distributions of Tribal lands nationwide, we seek comment on whether we should adapt the coverage requirements and deadlines to the particular tribal population or geography. Are there any particular special circumstances that, if encountered, would merit a longer time period? Would a shorter time period be appropriate in particular situations? Are there any measures the Commission should consider that might facilitate coverage to Tribal lands under the build-or-divest process?

58. We also seek comment on the technical rules to which a license acquired through the build-or-divest process might be subject. If the Commission were to determine that we should apply the additional tribal construction requirement to *current* licensees, we seek comment on whether the existing technical rules of such services are sufficient to protect the incumbent and the Tribal entity from interference, or whether there should be additional technical protections. Depending on the size and geography of the particular Tribal land, as well as the proximity of Tribal and non-Tribal sites to the shared boundary and to populated areas of the other licensee's geographic area, it may be possible that

⁸⁸ We note that for many Wireless Radio Services, the deadline for meeting the relevant construction requirements may be as late as the end of the licensee's initial license term.

⁸⁹ Most of the 565 federally-recognized tribes in the United States are located in "rural" areas, as that term is defined by the U.S. Census Bureau. See *GAO Telecommunications Report* at 7; see also *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, *Notice of Proposed Rulemaking*, 18 FCC Rcd 20,802, 20,820 ¶ 35 (2003) ("given the unique characteristics and considerations inherent in constructing within rural areas, we believe that applying an inflexible construction standard that is based upon coverage of a requisite percentage of an area's population may be an inappropriate measure of levels of rural construction.").

⁹⁰ We note that in the context of the Tribal lands bidding credit program, we require recipients of that credit to provide expedited service, specifically, that within three years of receiving authorization, they will certify that they have constructed and are operating a system capable of serving seventy-five (75) % of the population of the qualifying tribal land for which the credit was awarded. See 47 C.F.R. § 1.2110((f)(3)(vii).

existing technical rules are insufficient to allow incumbent and Tribal licensees to operate effectively.⁹¹ Existing technical rules may, in some circumstances, unnecessarily restrict the types of services that may be deployed in a given Tribal area. We therefore ask for comment regarding the specific technical rights and protections that should be applied. We request comment on specific signal strengths to be applied at the shared boundary, and other provisions that will protect the incumbent and tribal licensee while also permitting both to serve their licensed areas effectively. We propose that, for future wireless services, the Commission should address these technical issues in each service-specific rulemaking proceeding. We invite commenters to address these technical issues with respect to specific Wireless Radio Services and particular Tribal land areas. We also request that commenters identify those technical issues or criteria that they believe would apply to Tribal areas universally, or that should be applied to particular tribal areas regardless of the wireless service involved.

59. Under this Tribal proposal for a build-or-divest process, the geographic area covered by the unserved or underserved Tribal land would become available for licensing to the qualifying Tribal entity filing the Notice of Intent if a licensee opts to relinquish its authorization rather than extend coverage or if it opts to extend coverage and fails to do so within the time allowed. We seek comment on requiring a Tribal entity to submit an application for the available authorization to demonstrate its qualifications to hold a Commission license, pursuant to the requirements of the Communications Act.

60. We seek comment on applying construction requirements should an unserved Tribal geographic area be relicensed to a Tribal entity and ask how to define those requirements. For the reasons discussed above, we seek comment on whether we should require a Tribal licensee to provide the level of service that would otherwise be required of a licensee opting to extend coverage within three years of the grant of its license covering the Tribal land areas. We seek comment on possible alternatives that might take into account these and any relevant factors related to a new Tribal licensee's ability to deploy service.

61. We also seek comment on whether to allow transfer of or lease of spectrum rights with respect to all or part of the area licensed to the Tribal entity through the build-or-divest process. Should we allow a qualified Tribal licensee to enter into any secondary market transaction involving any portion of the licensed area to a third party that does not meet the eligibility standards for a qualifying Tribal applicant? Should we take any action in this regard to promote the objective of Tribal self-provisioning?

62. In the event that commenters support the ability by the Tribal licensee to enter into secondary market transactions with respect to all or a portion of its licensed area, we request that commenters specify the conditions that would apply. For example, should we permit the licensee to transfer all or part of its license once it has fulfilled its required service and construction obligations, or otherwise ensured that a certain level of service is being provided over Tribal lands? Would it be appropriate to allow secondary market transactions if the Tribal licensee indicates it is unlikely that it will be able to fulfill its construction obligations and that a third party is willing to take the license and complete construction by the appropriate deadline?

63. We seek comment on the effect of any such requirements on the ability of Tribal licensees to enter into contracts with third parties to build and operate wireless systems. Such contracts may be the most effective way for Tribes to obtain access to industry knowledge and equipment financing. In addition, we seek comment on whether and to what extent we should consider leasing arrangements

⁹¹ See, e.g., *National Broadband Plan* at 105, n.144, "To the extent the FCC issues licenses or requires partitioning of licenses for very small tribal areas, however, consideration must be given to whether special technical or coordination rules are necessary in order to facilitate service to the Tribal lands while minimizing the potential for interference among neighboring licensees."

between qualifying Tribal entities and non-Tribal entities to confer control that would disqualify the Tribal entity under the definition we propose above.⁹²

E. Tribal Lands Construction Safe Harbor

64. We propose to establish for licenses in the Wireless Radio Services a Tribal lands construction safe harbor provision. Under this proposal, a licensee that provides a specified level of service to the Tribal land areas within the geographic area of its license would be deemed to have met its construction obligations for its entire service area. We seek comment on this proposal. In particular would such a safe harbor create an incentive for licensees to serve Tribal lands by providing an alternative method to meet construction obligations with respect to any license that includes Tribal lands within the geographic area?

65. This proposed Tribal lands construction safe harbor would resemble current Commission rules that permit some licensees in some services to satisfy their construction requirements by providing service to rural areas.⁹³ For example, the Commission's rules provide that a Broadband Radio Service or Educational Broadband Service licensee has met safe harbor by, among other things, deploying a certain level of service to "rural areas."⁹⁴ For mobile service, this level is defined as coverage being deployed to at least 75% of the geographic area of at least 30% of the rural areas within the licensed area.⁹⁵

66. We seek comment on the specific construction requirement that must be met with respect to Tribal lands within the geographic area of a license in order to qualify for the proposed safe harbor. Specifically, for licenses with a substantial service requirement, we seek comment on providing a Tribal lands safe harbor for satisfaction of this requirement to a licensee that deploys coverage to at least 75% of the geographic area of the Tribal lands within the geographic area of its license area. We seek comment on what requirements to impose with respect to licenses that are subject to other forms of construction requirements. What other specific requirements should a Tribal lands safe harbor have? If such a safe harbor is established, what safeguards should be adopted to prevent licensees from exploiting the safe harbor? For example, should a licensee be permitted to avail itself of the proposed safe harbor if the tribal area does not meet a minimum geographic size or have a population that is at least ten percent of the area or population of the market as a whole?

67. We also seek comment on whether we should apply a construction multiplier rather than, or in addition to, a safe harbor as an incentive to serve Tribal lands. A licensee would be permitted to count the population or geographic coverage it has deployed to Tribal lands multiplied by a set percentage towards satisfaction of the licensee's construction requirement for the entire license area. We seek comment on the appropriate construction multiplier that would serve as an incentive for Tribal area buildout, as well as ensure adequate construction in non-Tribal areas of a licensed geographic area.

F. Potential Modification of Tribal Lands Bidding Credit Program

68. In a continuing effort to provide greater economic incentives for bringing service to Tribal lands, we also seek to explore potential modifications to our existing Tribal lands bidding credit rules.

⁹² Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17,503, 17,536-44 ¶¶ 67-82 (2004).

⁹³ See, e.g., 47 C.F.R. § 27.14(o)(1)(iii).

⁹⁴ *Id.*

⁹⁵ *Id.* The rule defines "rural areas" as "a county (or equivalent) with a population density of 100 persons per square mile or less."

This is consistent with the record and with the recommendations of the National Broadband Plan.⁹⁶ A Tribal lands bidding credit (TLBC) is available to any winning bidder in a Commission auction that commits to deploying facilities and providing wireless services to qualifying Tribal lands.⁹⁷ Qualifying Tribal lands are defined as federally-recognized tribal areas that are either unserved by any telecommunications carrier or that have a telephone service penetration rate of 85% or less. The Tribal lands bidding credit is in addition to any other bidding credit for which the applicant qualifies, such as the small business bidding credit.

69. A winning bidder that meets the requirements for a TLBC is entitled to the amount of \$500,000 for the first 200 square miles (518 square kilometers) of qualifying Tribal lands, and \$2,500 for each additional square mile (2,590 square kilometers) above the initial 200 square miles (518 square kilometers) of qualifying Tribal lands.⁹⁸ The TLBC is capped, depending on the amount of the winning bid: for winning bids less than or equal to \$1 million, the cap is 50% of the amount bid; for winning bids between \$1 million and \$2 million, the cap is \$500,000; and for winning bids in excess of \$2 million, the cap is 35% of the amount bid.⁹⁹

70. A licensee receiving a TLBC is subject to a construction performance requirement. The licensee has three years from the grant of its license to construct and operate a wireless system to cover at least 75 percent of the tribal population within its market.¹⁰⁰ At the end of this three-year period, the licensee must notify the Commission that it has met the 75 percent buildout requirement with regard to the Tribal lands for which the credit was awarded.¹⁰¹ If a licensee fails to make an adequate showing that it has met the 75 percent benchmark, it will be required to repay the bidding credit, plus interest, within 30 days after the conclusion of the construction period.¹⁰²

⁹⁶ See, e.g., Native Public Media and National Congress of American Indians November 2009 Joint Comments at 20; National Congress of American Indians, Native Public Media, New America Foundation's Open Technology Initiative, and Southern California Tribal Chairmen's Association December 2009 *Ex Parte* Joint Comments at 22-23; see also *National Broadband Plan* at 97.

⁹⁷ See 47 C.F.R. §§ 1.2107(e), 1.2110(f)(3)(i); see also Extending Wireless Telecommunications Services to Tribal lands, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 11,794 (2000); Extending Wireless Telecommunications Services to Tribal lands, WT Docket No. 99-266, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 4775, 4778-79 ¶ 10 (2003); Extending Wireless Telecommunications Services to Tribal lands, WT Docket No. 99-266, *Third Report and Order*, 19 FCC Rcd 17,652 (2004). See also "Wireless Telecommunications Bureau Announces Enhancements to the Universal Licensing System to Help Winning Bidders of FCC Auctions File for Tribal lands Bidding Credits," *Public Notice*, 16 FCC Rcd 5355 (2001); "Wireless Telecommunications Bureau Releases Additional Information Regarding the Procedures for Obtaining a Tribal lands Bidding Credit and List of Tribal lands," *Public Notice*, 15 FCC Rcd 24,838 (2000); "Wireless Telecommunications Bureau Announces Availability of Bidding Credits for Providing Wireless Services to Qualifying Tribal lands: Tribal lands Bidding Credits to be Available Beginning in Auction No. 36 (800 MHz Specialized Mobile Radio (SMR) Lower 80 Channels) and in Future Auctions," *Public Notice*, 15 FCC Rcd 18,351 (2000).

⁹⁸ 47 C.F.R. § 1.2110(f)(3)(iii).

⁹⁹ 47 C.F.R. § 1.2110(f)(3)(iv).

¹⁰⁰ 47 C.F.R. § 1.2110(f)(3)(vii)-(viii).

¹⁰¹ *Id.*

¹⁰² If the licensee then fails to repay the credit amount, the license will automatically cancel. 47 C.F.R. § 1.2110(f)(3)(vii)-(viii).

71. The TLBC application process consists of three steps. First, the winning bidder must indicate on its long-form application that it intends to provide service to qualifying Tribal lands.¹⁰³ Second, within 180 calendar days after the filing deadline for long-form applications, the applicant must submit a certification from the tribal government(s) being served.¹⁰⁴ Finally, by the conclusion of the 180-day period, the applicant must certify to the Commission that it will comply with Tribal lands bidding credit buildout requirements and that it will consult with the tribal government(s) regarding the siting of facilities and deployment of service on the Tribal lands.¹⁰⁵ Once the certifications from the applicant and the tribal government(s) being served are reviewed by the Commission, the bidding credit may be awarded.¹⁰⁶

72. One possibility would be to extend the TLBC program's current 3-year construction deadline. Such an extension would have the advantage of providing additional time for a licensee to construct and operate a wireless system. However, it could also delay deployment of service to those residents of Tribal lands who are intended to benefit from the TLBC. We seek comment on this possible extension of the construction deadline.

73. We could also consider extending the time frame to complete the certification process. This might encourage more bidders to seek the credit than would otherwise do so. We invite specific comment on these proposals and their potential costs and benefits. We also encourage commenters to offer any additional proposals that they may have for improving the TLBC program.

74. Are there other possible changes we could make to the TLBC program that may more effectively promote service to Tribal lands? For instance, are there ways in which to promote coordination between the TLBC recipient and the relevant Tribal government that could provide additional incentives for service deployment?

IV. PROCEDURAL MATTERS

A. *Ex Parte* Rules – Permit-But-Disclose

75. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules.¹⁰⁷

B. Filing of Comments and Reply Comments

76. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. When filing comments or reply comments, please reference **WT Docket No. 11-40**. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS),

¹⁰³ 47 C.F.R. § 1.2107(e).

¹⁰⁴ The Tribal government must certify that: (1) the tribal land is a qualifying tribal land; (2) the tribal government has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers and will not unreasonably discriminate among wireless carriers seeking to provide service on the qualifying tribal land; and, (3) the tribal government will permit the applicant to site facilities and provide service on the tribal land. The tribal government will also be required to certify that the telephone penetration rate is equal to or less than 85%.

¹⁰⁵ 47 C.F.R. § 1.2110(f)(3)(ii)(A)-(C).

¹⁰⁶ *Id.*

¹⁰⁷ See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

(2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

77. Persons with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). This Notice also can be downloaded in Word and Portable Document Formats (PDF) at www.fcc.gov. Contact the FCC to request reasonable accommodations for filing comments (e.g., accessible format documents) by e-mail at: FCC504@fcc.gov; phone: 202-418-0530; or TTY: 202-418-0432.

C. Initial Regulatory Flexibility Analysis

78. As required by the Regulatory Flexibility Act of 1980 (RFA),¹⁰⁸ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this document. The analysis is found in the Appendix. We request written public comment on the analysis. Comments must be filed by the same dates as listed in the first page of this document, and must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

D. Initial Paperwork Reduction Analysis

79. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and

¹⁰⁸ 5 U.S.C. § 603.

the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

V. ORDERING CLAUSES

80. Accordingly, IT IS ORDERED, pursuant to Sections 1, 2, 4(i), 7, 10, 201, 214, 251(e), 301, 302, 303, 307(b), 308, 309(j), 310, 319, 324, 332 and 333 of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 251(e), 301, 302, 303, 307(b), 308, 309(j), 310, 319, 324, 332, 333, that this Notice of Proposed Rulemaking is hereby ADOPTED.

81. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

82. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on this Notice of Proposed Rulemaking on or before 45 days after publication in the Federal Register, and reply comments on or before 75 days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 C.F.R. Part 1 to read as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(j), 160, 201, 225, 303, and 309.

2. Amend Subpart F to Part 1 of Title 47 of the Code of Federal Regulations to read as follows:

TRIBAL LANDS SPECTRUM UTILIZATION PROGRAMS

§ 1.1001 Introduction.

The purpose of these rules is to improve the availability of wireless communications services on unserved and underserved Tribal lands by promoting greater use of spectrum over Tribal lands.

§ 1.1002 Definitions.

Qualifying Tribal entity. (a) For the purposes of this subpart any of the following entities, as further explained below, may be designated as a qualifying Tribal entity: (1) a Tribe; (2) a Tribal consortium; or, (3) an entity that is more than 50 percent owned and controlled by a Tribe or Tribes, provided that such entity is designated by the Tribal government or governments having jurisdiction over particular Tribal land and for which the spectrum access is sought.

(b) *Tribe.* Tribe(s) means any American Indian Tribe, Nation, Band, Pueblo, or Community, or Alaska Native Village, which is acknowledged by the federal government to have a government-to-government relationship with the United States and eligible for the programs and services established by the United States for Indians.

(c) *Tribal consortium.* A tribal consortium is a conglomerate organization composed of two or more Tribes, or a Tribe together with an entity that is more than 50 percent owned and controlled by a Tribe or Tribes, as defined herein.

(d) *Entities that are more than 50 percent owned and controlled by a Tribe or Tribes.* For purposes of this subpart, an entity will be considered to be more than 50 percent owned and controlled by a Tribe or Tribes where the Tribe or Tribes have both *de jure* and *de facto* control of the entity. *De jure* control of an entity is evidenced by ownership of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. *De facto* control of an entity is determined on a case-by-case basis. A Tribe or Tribes must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant seeking eligibility as a qualifying Tribal entity:

- (1) The Tribe(s) constitutes or appoints more than 50 percent of the board of directors or management committee of the entity;
- (2) The Tribe(s) has authority to appoint, promote, demote, and fire senior executives that control the day to day activities of the entity; and

- (3) The Tribe(s) plays an integral role of the management decisions of the entity.
- (4) The Tribe(s) has the authority to make decisions or otherwise engage in practices or activities that determine or significantly influence:
- (i) the nature or types of services offered by such an entity;
 - (ii) the terms upon which such services are offered; or
 - (iii) the prices charged for such services.
- (e) An applicant seeking eligibility to be a qualifying Tribal entity must describe on its long-form application how it satisfies the requirements of section 1.1002(b)-(d), and must list and summarize on its long-form application all agreements that affect its eligibility such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, and all other agreements, including oral agreements, establishing *de facto* and *de jure* control of the qualifying Tribal entity. A qualifying Tribal entity also must provide the date(s) on which each of the agreements listed was entered into.
- (f) An applicant seeking eligibility as a qualifying Tribal entity must attach with its long form application a certification from the Tribal government stating that the applicant is authorized by the Tribal government to site facilities and provide service on its Tribal lands.

Tribal land(s). Any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

Unserved and/or underserved Tribal land(s). Those Tribal lands with Wireless Radio Services coverage to no more than 65 percent of the population of the Tribal land area based on the most recently available U.S. Census Data.

§ 1.1003 Tribal Licensing Priority.

During a window announced by the Commission for the filing of applications for a Tribal licensing priority, a qualifying Tribal entity having jurisdiction over unserved or underserved Tribal lands within the geographic area of a Wireless Radio Service license that has not been assigned, may submit a long-form license application for an authorization to use the Tribal land portion of that license. In the event that license applications filed by qualifying Tribal entities are mutually exclusive, the Commission will resolve these mutually exclusive applications by means of a competitive bidding process open only to those qualifying Tribal entities.

§ 1.1004 Tribal Lands Construction Safe Harbor.

(a) *Satisfaction of Construction Requirements through Service to Tribal Lands.* A Wireless Radio Licensee with Tribal lands within the geographic area of its license will be deemed to have satisfied its construction obligations for its entire service area if it deploys coverage to at least 75% of the geographic area of such Tribal lands.

APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rule Making ("NPRM"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided in paragraph 76 of the NPRM. The Commission will send a copy of this NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").² In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. This NPRM seeks comment on proposals that would promote increased use of spectrum over Tribal lands. The proposals in this NPRM are intended to increase availability of wireless communications over Tribal lands. The Commission has worked closely with federally-recognized American Indian Tribes and Alaska Native Villages ("Tribes") from around the country on developing the proposals in this NPRM.

3. The NPRM contains five substantive proposals. First, the NPRM proposes to expand the Commission's current Tribal licensing priority for broadcast licenses to certain Wireless Radio Services, creating opportunities for access to Wireless Radio Services licenses not yet assigned. Under the current Tribal priority, federally recognized Tribes, Tribal consortia, and entities that are more than 50 percent owned by a Tribe or Tribes are entitled to a priority relative to non-Tribal entities when proposing FM allotments, as well as applying for AM and noncommercial educational FM stations, that would primarily serve Tribal lands.⁴ As envisioned in the NPRM, an extension of this Tribal priority to the licensing of wireless services could provide a path by which Tribal entities could gain access to licensed spectrum licenses covering their unserved and underserved Tribal lands.

4. Second, the NPRM seeks comment on a Tribal proposal to create a negotiation process under which Tribes could work with entities that hold Wireless Radio Service licenses to bargain in good faith for access to spectrum over unserved or underserved Tribal land. This proposal aims to combat the hurdle some Tribes have encountered where wireless licensees holding spectrum over Tribal lands have met their construction requirements, but have not built out networks to provide service to Tribal lands within their geographic area of license. If adopted this process would allow Tribes to take advantage of existing Commission rules and policies that allow license holders to provide other parties with access to spectrum through license partitioning or through spectrum leasing. For example, the NPRM envisions that a Tribe might negotiate with a wireless licensee to lease or partition the portion of the license that covers Tribal lands.

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601- 612 has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ *Id.*

⁴ Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, *First Report and Order and Further Notice of Proposed Rulemaking*, 25 FCC Rcd 1583 (2010) (Commission Order establishing the broadcast Tribal priority). See also 47 C.F.R. §§ 73.7000 - 73.7005.

5. Third, the NPRM invites comment on a Tribal proposal to put into use licensed spectrum covering Tribal lands that is not being used to provide wireless services. As described in the NPRM, a Tribal entity could initiate a process under which a licensee would be obligated to build out in unserved or underserved Tribal areas or divest the geographic license area covering unserved or underserved Tribal lands. The NPRM seeks comment on making available such a process where an existing licensee has satisfied the applicable construction requirements for the license yet Tribal land areas remain unserved or underserved. This proposal is intended to provide Tribal governments with a process under which they could expedite service to Tribal lands.

6. A fourth proposal in the NPRM would encourage licensees to deploy service on Tribal lands by enabling licensees that do so to satisfy, or get extra credit toward satisfying, the construction requirements for their licenses by focusing deployments on Tribal lands. This proposal is similar to previous efforts by the Commission to provide incentives for licensees to deploy service in rural areas.⁵ The NPRM seeks comment on all aspects of this proposal.

7. Fifth, the NPRM seeks input on possible revisions to the Commission's current Tribal lands bidding credit program.⁶ The Commission proposes consideration of a range of possible changes including: extending the current 3-year construction deadline within which the recipient of a Tribal lands bidding credit must deploy service on the relevant Tribal lands; and extension of the current 180-day deadline for an auction winner to obtain the necessary certification from the Tribal government for whose Tribal lands the applicant seeks to provide service.

8. Adoption of some or all of the proposals in the NPRM may result in increased recordkeeping and reporting requirements for certain Wireless Radio Services licensees that are small businesses. We therefore seek comment on how to minimize any such associated burden on licensees that are small businesses.

B. Legal Basis

9. The legal basis for the proposed rules and the NPRM is contained in Sections 1, 2, 4(i), 7, 10, 201, 214, 251(e), 301, 302, 303, 307(b), 308, 309(j), 310, 319, 324, 332 and 333 of the Communications Act of 1934, as amended ("Communications Act" or "Act"), 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 251(e), 301, 302, 303, 307(b), 308, 309(j), 310, 319, 324, 332, and 333 and section 1.411 of the Commission's rules, 47 C.F.R. § 1.411.

⁵ See, e.g., 47 C.F.R. § 27.14(o)(1)(iii) (stating that a Broadband Radio Service or Educational Broadband Service licensee can meet the "substantial service" requirement for license renewal by, among other things, providing a required minimum level of service to rural areas).

⁶ See 47 C.F.R. §§ 1.2107(e), 1.2110(f)(3)(i); see also *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 11,794 (2000); *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 4775, 4778-79 ¶ 10 (2003); *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Third Report and Order*, 19 FCC Rcd 17,652 (2004). See also "Wireless Telecommunications Bureau Announces Enhancements to the Universal Licensing System to Help Winning Bidders of FCC Auctions File for Tribal Lands Bidding Credits," *Public Notice*, 16 FCC Rcd 5355 (2001); "Wireless Telecommunications Bureau Releases Additional Information Regarding the Procedures for Obtaining a Tribal Lands Bidding Credit and List of Tribal Lands," *Public Notice*, 15 FCC Rcd 24,838 (2000); "Wireless Telecommunications Bureau Announces Availability of Bidding Credits for Providing Wireless Services to Qualifying Tribal Lands: Tribal Lands Bidding Credits to be Available Beginning in Auction No. 36 (800 MHz Specialized Mobile Radio (SMR) Lower 80 Channels) and in Future Auctions," *Public Notice*, 15 FCC Rcd 18,351 (2000). These Commission Orders and other documents provide extensive information about the Tribal Lands bidding credit program.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

10. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁷ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁸ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹⁰

11. Small Businesses. According to estimates prepared by SBA's Office of Advocacy, in 2009, there were a total of approximately 27.5 million small businesses nationwide.¹¹

12. Small Organizations. Nationwide, as of 2002, there are approximately 1.6 million small organizations.¹² A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹³

13. Small Governmental Jurisdictions. The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."¹⁴ Census Bureau data for 2002 indicate that there were 89,476 local governmental jurisdictions in the United States.¹⁵ We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."¹⁶ Thus, we estimate that most governmental jurisdictions are small.

⁷ 5 U.S.C. § 603(b)(3).

⁸ 5 U.S.C. § 601(6).

⁹ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

¹⁰ Small Business Act, 15 U.S.C. § 632 (1996).

¹¹ See SBA, Office of Advocacy, "Frequently Asked Questions," <http://web.sba.gov/faqs/faqindex.cfm?areaID=24> (visited Mar. 2, 2011).

¹² Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

¹³ 5 U.S.C. § 601(4).

¹⁴ 5 U.S.C. § 601(5).

¹⁵ U.S. Census Bureau, *Statistical Abstract of the United States: 2011, State and Local Government Finances and Employment*, p. 267, Table 426.

¹⁶ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, p. 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

Wireless Providers – Fixed and Mobile

14. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.¹⁷ Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”¹⁸ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.¹⁹ For the category of Wireless Telecommunications Carriers (except Satellite), preliminary data for 2007 show that there were 11,927 firms operating that year.²⁰ While the Census Bureau has not released data on the establishments broken down by number of employees, we note that the Census Bureau lists total employment for all firms in that sector at 281,262.²¹ Since all firms with fewer than 1,500 employees are considered small, given the total employment in the sector, we estimate that the vast majority of wireless firms are small.

15. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.²² The SBA approved these definitions.²³ The Commission conducted an auction of geographic area licenses in the WCS service in 1997. In the auction, seven bidders that qualified as very small business entities won licenses, and one bidder that qualified as a small business entity won a license.²⁴

¹⁷ U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite),” www.census.gov/naics/2007/def/ND517210.HTM#N517210 (visited Mar. 2, 2011).

¹⁸ U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging,” www.census.gov/epcd/naics02/def/NDEF517.HTM (visited Mar. 2, 2011); U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications,” www.census.gov/epcd/naics02/def/NDEF517.HTM (visited Mar. 2, 2011).

¹⁹ 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

²⁰ U.S. Census Bureau, 2007 Economic Census, Sector 51, EC0751I1 Information: Industry Series: Preliminary Summary Statistics for the United States: 2007, NAICS code 517210 (issued Oct. 20, 2009), factfinder.census.gov/servlet/IBQTable?_fds_name=EC0700A1&-clearIBQ=Y&-ds_name=EC0751I1&-NAICS2007=51721 (visited Mar. 2, 2011).

²¹ *Id.*

²² Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10,785, 10,879 ¶ 194 (1997).

²³ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, filed Dec. 2, 1998 (“*Alvarez Letter 1998*”).

²⁴ As a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

16. *1670–1675 MHz Services.* This service can be used for fixed and mobile uses, except aeronautical mobile.²⁵ An auction for one license in the 1670–1675 MHz band was conducted in 2003. The winning bidder was not a small entity.

17. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).²⁶ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.²⁷ According to *Trends in Telephone Service* data, 413 carriers reported that they were engaged in wireless telephony.²⁸ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.²⁹ Therefore, more than half of these entities can be considered small.

18. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a “small business” for C- and F-Block licenses as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.³⁰ For F-Block licenses, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.³¹ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.³² No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions.³³ A total of 93 bidders that claimed small business status won licenses in the first auction for the D, E, and F Blocks.³⁴ In 1999, the Commission completed a subsequent auction of C-, D-, E-, and F-Block licenses.³⁵ Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.³⁶

²⁵ 47 C.F.R. § 2.106; *see generally* 47 C.F.R. §§ 27.1–70.

²⁶ 13 C.F.R. § 121.201, NAICS code 517210.

²⁷ *Id.*

²⁸ TRENDS IN TELEPHONE SERVICE, tbl. 5.3.

²⁹ *Id.*

³⁰ *See* Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap et al., *Report and Order*, 11 FCC Rcd 7824, 7850–52, ¶¶ 57–60 (1996) (“PCS Report and Order”); *see also* 47 C.F.R. § 24.720(b).

³¹ *See PCS Report and Order*, 11 FCC Rcd at 7852 ¶ 60.

³² *See Alvarez Letter 1998.*

³³ *See* Entrepreneurs’ C Block Auction Closes, *Public Notice*, DA 96-716 (1996); Entrepreneurs C Block Reauction Closes, *Public Notice*, DA 96-1153 (1996).

³⁴ *See* Broadband PCS, D, E and F Block Auction Closes, *Public Notice*, Doc. No. 89838 (rel. Jan. 14, 1997).

³⁵ *See* C, D, E, and F Block Broadband PCS Auction Closes, *Public Notice*, 14 FCC Rcd 6688 (1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd 15,743, 15,768 ¶ 46 (1998).

³⁶ *See* C, D, E, and F Block Broadband PCS Auction Closes, *Public Notice*, 14 FCC Rcd 6688 (1999).

19. The Commission completed an auction of C and F Block Broadband PCS licenses in 2001. Of the 35 winning bidders in that auction, 29 claimed small business status.³⁷ Subsequent events concerning that auction, including judicial and agency determinations, resulted in only a portion of those C and F Block licenses being available for grant. The Commission completed an auction of C-, D-, E-, and F-Block licenses in 2005. Of the 24 winning bidders in that 2005 auction, 16 claimed small business status and won 156 licenses.³⁸ In 2007, the Commission completed an auction of licenses in the A, C, and F Blocks.³⁹ Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.⁴⁰ Most recently, in 2008, the Commission completed the auction of C-, D-, E-, and F-Block Broadband PCS licenses.⁴¹ Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.⁴²

20. *Lower 700 MHz Band Licenses.* The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.⁴³ The Commission defined a “small business” as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁴⁴ A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁴⁵ Additionally, the lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—“entrepreneur”—which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.⁴⁶ The SBA approved these small size standards.⁴⁷ An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) was conducted in 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won licenses.⁴⁸ A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses.⁴⁹ Seventeen winning

³⁷ See C and F Block Broadband PCS Auction Closes; Winning Bidders Announced, *Public Notice*, 16 FCC Rcd 2339 (2001).

³⁸ See Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58, *Public Notice*, 20 FCC Rcd 3703 (2005).

³⁹ See Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71, *Public Notice*, 22 FCC Rcd 9247 (2007).

⁴⁰ *Id.*

⁴¹ See Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78, *Public Notice*, 23 FCC Rcd 12,749 (2008).

⁴² *Id.*

⁴³ See Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59), *Report and Order*, 17 FCC Rcd 1022 (2002) (“*Channels 52–59 Report and Order*”).

⁴⁴ See *id.*, 17 FCC Rcd at 1087–88 ¶ 172.

⁴⁵ See *id.*

⁴⁶ See *id.*, 17 FCC Rcd at 1088 ¶ 173.

⁴⁷ See *Alvarez Letter 1998*.

⁴⁸ See Lower 700 MHz Band Auction Closes, *Public Notice*, 17 FCC Rcd 17,272 (2002).

⁴⁹ See Lower 700 MHz Band Auction Closes, *Public Notice*, 18 FCC Rcd 11,873 (2003).

bidders claimed small or very small business status, and nine winning bidders claimed entrepreneur status.⁵⁰ In 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band. All three winning bidders claimed small business status.

21. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.⁵¹ An auction of A, B and E block 700 MHz licenses was held in 2008.⁵² Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years).

22. *Upper 700 MHz Band Licenses.* In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.⁵³ In 2008, the Commission commenced Auction 73 in which C and D block licenses in the Upper 700 MHz band were available.⁵⁴ Three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed \$15 million for the preceding three years).

23. *700 MHz Guard Band Licensees.* In 2000, in the 700 MHz Guard Band Order, the Commission adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁵⁵ A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.⁵⁶ Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁵⁷ SBA approval of these definitions is not required.⁵⁸ An auction of these licenses was conducted in 2000.⁵⁹ Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses. A second auction of 700 MHz Guard Band licenses was held in 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business.⁶⁰

24. *Air-Ground Radiotelephone Service.* The Commission has previously used the SBA’s small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*,

⁵⁰ See *id.*

⁵¹ 700 MHz Second Report and Order, *Second Report and Order*, 22 FCC Rcd 15,289, 15,359 n.434 (2007).

⁵² See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (2008).

⁵³ 700 MHz Second Report and Order, 22 FCC Rcd 15,289.

⁵⁴ See Auction of 700 MHz Band Licenses Closes, *Public Notice*, 23 FCC Rcd 4572 (2008).

⁵⁵ See Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000) (“746–764 MHz Band Second Report and Order”).

⁵⁶ See 746–764 MHz Band Second Report and Order, 15 FCC Rcd at 5343 ¶ 108.

⁵⁷ See *id.*

⁵⁸ See *id.* at 5343 ¶ 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

⁵⁹ See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced, *Public Notice*, 15 FCC Rcd 18,026 (2000).

⁶⁰ See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced, *Public Notice*, 16 FCC Rcd 4590 (2001).

an entity employing no more than 1,500 persons.⁶¹ There are fewer than 10 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$40 million.⁶² A “very small business” is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding \$15 million.⁶³ These definitions were approved by the SBA.⁶⁴ In its 2006 auction nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band, neither of the winning bidders claimed small business status.

25. *AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS-1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS-2); 2155–2175 MHz band (AWS-3)).* For the AWS-1 bands, the Commission has defined a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million.⁶⁵ In 2006, the Commission conducted its first auction of AWS-1 licenses.⁶⁶ In that initial AWS-1 auction, 31 winning bidders identified themselves as very small businesses.⁶⁷ Twenty-six of the winning bidders identified themselves as small businesses.⁶⁸ In a subsequent 2008 auction, the Commission offered 35 AWS-1 licenses.⁶⁹ Four winning bidders identified themselves as very small businesses, and three of the winning bidders identified themselves as a small business.⁷⁰ For AWS-2 and AWS-3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS-1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS-2 or AWS-3 bands but has proposed to treat both AWS-2 and AWS-3 similarly to broadband PCS service and AWS-1

⁶¹ 13 C.F.R. § 121.201, NAICS codes 517210.

⁶² Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services et al., *Order on Reconsideration and Report and Order*, 20 FCC Rcd 19,663, ¶¶ 28–42 (2005).

⁶³ *Id.*

⁶⁴ See Letter from Hector V. Barreto, Administrator, Small Business Administration, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, filed Sept. 19, 2005.

⁶⁵ See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order*, 18 FCC Rcd 25,162, App. B (2003), *modified by* Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands, *Order on Reconsideration*, 20 FCC Rcd 14,058, App. C (2005).

⁶⁶ See “Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66,” AU Docket No. 06-30, *Public Notice*, 21 FCC Rcd 4562 (2006) (“*Auction 66 Procedures Public Notice*”).

⁶⁷ See “Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66,” *Public Notice*, 21 FCC Rcd 10,521 (2006) (“*Auction 66 Closing Public Notice*”).

⁶⁸ See *id.*

⁶⁹ See *AWS-1 and Broadband PCS Procedures Public Notice*, 23 FCC Rcd at 7499. Auction 78 also included an auction of broadband PCS licenses.

⁷⁰ See “Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period,” *Public Notice*, 23 FCC Rcd 12,749 (2008).

service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.⁷¹

26. *3650–3700 MHz band.* In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, utilizing contention-based technologies, in the 3650 MHz band (*i.e.*, 3650–3700 MHz).⁷² As of April 2010, more than 1270 licenses have been granted and more than 7433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licensees. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

27. *Fixed Microwave Services.* Microwave services include common carrier,⁷³ private-operational fixed,⁷⁴ and broadcast auxiliary radio services.⁷⁵ They also include the Local Multipoint Distribution Service (LMDS),⁷⁶ the Digital Electronic Message Service (DEMS),⁷⁷ and the 24 GHz Service. At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private-operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.⁷⁸ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.⁷⁹ For the category of Wireless Telecommunications Carriers (except Satellite), preliminary data for 2007 show that there were 11,927 firms operating that year.⁸⁰ While the Census Bureau has not released data on the establishments broken down by number of employees, we note that the Census Bureau lists total employment for all

⁷¹ Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands et al., *Notice of Proposed Rulemaking*, 19 FCC Rcd 19,263, App. B (2005); Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band, *Notice of Proposed Rulemaking*, 22 FCC Rcd 17,035, App. (2007); Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band, *Further Notice of Proposed Rulemaking*, 23 FCC Rcd 9859, App. B (2008).

⁷² The service is defined in section 90.1301 *et seq.* of the Commission's Rules, 47 C.F.R. § 90.1301 *et seq.*

⁷³ See 47 C.F.R. Part 101, Subparts C and I.

⁷⁴ See 47 C.F.R. Part 101, Subparts C and H.

⁷⁵ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

⁷⁶ See 47 C.F.R. Part 101, Subpart L.

⁷⁷ See 47 C.F.R. Part 101, Subpart G.

⁷⁸ 13 C.F.R. § 121.201, NAICS code 517210.

⁷⁹ 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

⁸⁰ U.S. Census Bureau, 2007 Economic Census, Sector 51, EC0751I1 Information: Industry Series: Preliminary Summary Statistics for the United States: 2007, NAICS code 517210 (rel. Oct. 20, 2009), factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-clearIBQ=Y&-ds_name=EC0751I1&-NAICS2007=51721&-lang=en (visited Mar. 2, 2011).

firms in that sector at 281,262.⁸¹ Since all firms with fewer than 1,500 employees are considered small, given the total employment in the sector, we estimate that the vast majority of firms using microwave services are small. We note that the number of firms does not necessarily track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

28. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).⁸² In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.⁸³ Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.⁸⁴ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. In 2009, the Commission conducted an auction of 78 BRS licenses.⁸⁵ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.⁸⁶ Of the ten winning bidders, two bidders claimed small business status; one bidder claimed very small business status; and two bidders claimed entrepreneur status.⁸⁷

⁸¹ *Id.*

⁸² Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, MM Docket No. 94-131, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995).

⁸³ 47 C.F.R. § 21.961(b)(1).

⁸⁴ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard of 1500 or fewer employees.

⁸⁵ Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, *Public Notice*, 24 FCC Rcd 8277 (2009).

⁸⁶ *Id.* at 8296.

⁸⁷ Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period, *Public Notice*, 24 FCC Rcd 13,572 (2009).

29. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.⁸⁸ Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."⁸⁹ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use the most current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.⁹⁰ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.⁹¹ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁹² Thus, the majority of these firms can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

30. As discussed above, this NPRM seeks public comment on a broad range of possible solutions aimed at improving deployment of wireless communications services on Tribal lands. Some of these proposals could have potential reporting, recordkeeping, and compliance burdens for small businesses. For example, Tribal entities, some of which may be considered small entities, may be required to submit information or applications in order to initiate processes for spectrum access as proposed in this NPRM. In addition, the adoption of the good faith negotiation and/or some of the construction proposals discussed in this NPRM might require a small business that provides wireless communications service to areas including Tribal lands to keep records of its service deployment on Tribal lands. If a Tribal entity were to request the initiation of either the good faith negotiation or certain of the proposals for constructing on unserved or underserved Tribal lands, a small business WRS licensee might be required to submit service deployment and related information to the Commission if it wished to contest the initiation of either process. Similarly, the adoption of the good faith negotiation standards proposed in this NPRM might require a small business WRS licensee to keep records of negotiations, if any, between itself and a Tribal entity.

31. Because the specific nature of these proposals has not been finalized, we do not have a more specific estimate of potential reporting, recordkeeping, and compliance burdens on small businesses. The Commission anticipates that commenters will address the reporting, record-keeping, and

⁸⁸ The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

⁸⁹ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110 (visited Mar. 2, 2011).

⁹⁰ 13 C.F.R. § 121.201, NAICS code 517110.

⁹¹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, tbl. 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (rel. November 2005).

⁹² *Id.* An additional 61 firms had annual receipts of \$25 million or more.

other compliance proposals made in the NPRM, and will provide reliable information on any costs and burdens on small businesses for inclusion in the record of this proceeding.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

32. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁹³

33. The proposals contained in this NPRM seek to benefit Tribes and residents of Tribal lands by promoting increased use of spectrum over Tribal lands and thereby help to close communications gaps on Tribal lands. If these programs are adopted and are successful in encouraging the deployment of service to Tribal land areas, Tribes, members of Tribes and other residents of Tribal lands would benefit by having improved connectivity. These proposals, if adopted, are not intended to impose any burden on Tribal entities, though Tribes may assume additional obligations should they elect to initiate the processes described in this NPRM. Therefore, this IRFA contains no analysis of the proposals' burden on Tribes.

34. The reporting and recordkeeping requirements in this NPRM could have an impact on both small and large entities. While any such impact could be more financially burdensome for smaller entities, the Commission believes the impact of such requirements would be outweighed by the benefits of promoting greater utilization of spectrum over Tribal lands. As discussed in Sections A and D of this IRFA, the adoption of the proposals in the NPRM could result in increased reporting and recordkeeping burdens for small businesses that hold certain Wireless Radio Service licenses. The Commission asks for comment on alternative ways to minimize any such burdens for small businesses. The Commission expects to consider the economic impact on small businesses and other small entities, as identified in comments filed in response to the NPRM, in reaching its final conclusions and taking action in this proceeding.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

35. None.

⁹³ See 5 U.S.C. § 603(c).

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (MB Docket No.09-52); Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40); Improving Communications Services for Native Nations (CG Docket No. 11-41)*

As we developed the National Broadband Plan last year, we asked Americans to share with us their concerns if broadband wasn't available where they lived. And a woman named Sara from White Swan, Washington wrote us back. She told us:

With [b]roadband made available here in the rural areas of the Yakama Indian Reservation it would help us out a[l]ot. My [s]ister and I are disabled and do not drive much. . . . Faster internet would help with education needs in our home. . . .

The phone co[mpany] keeps telling us ["soon["] for broadband[. W]e have seen them upgrade the lines right in front of our home, but [are] still waiting for some type of upgrades to come in to the substation to allow people further out access to broadband.

Our job here at the Commission is to help turn "soon" into "today." Because communications services like broadband, wireless communications and radio aren't just valuable as means to deliver entertainment and diversions. They are vital platforms for community-building, cultural preservation, and the promotion of public health, education and economic opportunity in Native Nations.

Native Nations' unique circumstances vary widely – from reservations along the Eastern Seaboard, to Alaska Villages, to the Home Lands of Native Hawaiians – but we also know that many of you share similar visions for how broadband can improve the daily lives of Native Americans. Today's items are about ways to help the leaders of Native Nations achieve those visions for their own communities.

Our first item will help Native Nations preserve their culture, language, and community values by making it easier to deploy rural radio service. This will particularly help Native Nations with small or irregularly shaped lands and non-landed Native Nations provide their citizens with programming that meets their needs and interests.

Our second item, the Spectrum over Tribal Lands NPRM, will create new opportunities for Native Nations to gain access to spectrum and create new incentives for licensees to deploy wireless services on Tribal Lands. We know that there have been lives lost in Native America because of the lack of basic communications services. We know that in the cold of a recent winter, when a car broke down on a reservation in the North Plains and a signal was not available, two young Indian men froze to death. We know that not too long ago in Arizona Indian Country, when a father and family man had a heart attack, his family had too far to travel just to reach a telephone. When emergency services finally arrived, it was too late.

But we *also* know that wireless availability can help bridge these gaps and even save lives. Wireless can make it easier to manage chronic diseases that plague places like Indian Country in Southern Arizona, where over one-third of American Indians over 20 have been diagnosed with diabetes. And so I am hopeful that this item will not just help more people in Native Nations obtain access to wireless, but also in some small way help communities tackle the public health challenges they face today.

And our third item, a Notice of Inquiry on Improving Communications Services for Native Nations, will lay the groundwork for policies that can help Native Nations build economic and educational opportunity for their members on their own sovereign lands. I've said on many occasions that broadband is indispensable infrastructure for economic growth and job creation. And nowhere is that need more acutely felt than on Tribal lands. The lack of robust broadband services contributes to the challenges each of you face in building strong economies with diverse businesses and development projects. So we seek comment on the best ways to support sustainable broadband deployment, adoption, and digital literacy training on Tribal lands.

Among other important questions, we also ask about opportunities to use communications services to help Native Nations address public safety challenges on Tribal lands, including the broad lack of 911 and E-911 services, and the needs of persons with disabilities. We consider how barriers to entry might be preventing the deployment of satellite services in the most remote parts of Native Nations. And we also begin a new inquiry into the status of Hawaiian Home Lands.

In all these efforts, we look forward to working directly with you and finding the right answers to complex problems, to ensure that our actions are wisely taken and lead to effective solutions in your communities. Because as I said to many of you a year ago at the same NCAI winter conference that many of you have just attended, an important and unique trust relationship exists between the Commission and Native Nations. And that trust relationship has borne fruit today. Several of the items we adopt today grow largely out of ideas and proposals advocated by the Native community, and begin to break down barriers for Native Nations and their governmental entities to enter the communications field themselves. These actions recognize the important role that Native Nations play in planning and delivering services and the genuine potential of Tribal or Native-centric approaches to developing successful service models.

We are committed to honoring your sovereignty and self-determination, and strengthening our nation-to-nation relationships. In that spirit, later today, the Office of Native Affairs and Policy and our Bureaus will be hosting a separate session to engage in a dialogue and listening session with our guests from Native Nations on these items. And because we place a high value on your input and consultative guidance, I am pleased to announce today another action to help us work better together: the establishment of an FCC-Native Nations Broadband Task Force, as recommended by the National Broadband Plan, comprised of leaders from across the Native Nations and senior staff from across the Commission. This Task Force, co-chaired by Geoff Blackwell and a co-chair elected from among the 19 Native Nations representatives on the Task Force, will be a permanent mechanism for this Commission and sovereign Native Nations to work together on a positive policy agenda for communications in Native America.

Thank you again to our honorable guests for coming to the Commission today. Like my colleagues, I look forward to coming to your Nations in person soon, and hope that you will find our afternoon discussions informative and productive.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (MB Docket No.09-52); Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40); Improving Communications Services for Native Nations (CG Docket No. 11-41)*

Honorable Tribal Leaders, thank you for joining us here at the Federal Communications Commission. This past November, I had the privilege to talk with many of you at the Annual Conference of the National Congress of American Indians in Albuquerque. I brought with me to that meeting Chairman Genachowski's pledge that we would hold this meeting—a Tribal Issues Commission Meeting to focus on the telecommunications and media issues that matter most to Indian Country. It has been a long time in coming, but today we are now moving seriously toward a more comprehensive, consultative and holistic approach to identifying and removing barriers to the deployment and adoption of services on and near Tribal lands.

Providing every person in this country with Twenty-first century communications is the great infrastructure challenge of our time. We cannot afford to leave *any* American behind. That must certainly include the original Americans—Native Americans—so that they, too, can reap the benefits of these enabling communications technologies. On my visits to Indian Country, I have seen first-hand how much harm the lack of telecommunications infrastructure is inflicting on the people living on and near Tribal lands, Alaska Native Villages and Hawaiian Home Lands. In so many places where Native Americans live, poverty endures, unemployment is at levels no society should tolerate, education languishes, and even basic public safety falls far short of what people have a right to expect. Modern telecommunications and ubiquitous media are strangers in much of Indian Country. Even plain old telephone service is at shockingly low levels of penetration—below seventy percent of Native American households, and in some areas far less than that. And we don't even begin to have reliable data on the status of Internet subscribership on Tribal lands. Anecdotally, we know that broadband access on Tribal lands is minimal, and certainly lower than ten percent. It's a national disgrace—and it's hurting us all. While I have seen some marked improvements in some places in Indian Country over the last decade, so much more cries out to be done. There's an old saying: Access denied is opportunity denied. Until Indian Country is connected to a Twenty-first century broadband telecommunications grid, opportunity will pass quicker than a meteor over Indian Country. And the people who live there will only fall farther behind the rest of the country and the rest of the world.

When we created the Office of Native Affairs and Policy last August, I was encouraged that we were on the path to meaningful progress on these challenges. And, I was even more encouraged when my old friend, Geoff Blackwell, was selected to head that office. What a gift he is to this Commission! And we have beefed up, by orders of magnitude, the FCC's resources dedicated to building a better trust relationship with Tribal Governments. Having the structures and people in place, though, won't by itself solve these generations-long and deep-rooted problems. We need a serious commitment on the part of this agency to get the job done—and, with this Chairman and with this Commission, we are finally making that commitment.

But success here can only be the product of our cooperative work together. If the Commission is going to help resolve the challenges you face, it must first understand them. See them. Feel them. We need to hear from you on an ongoing basis about your experiences, your ideas and your priorities to help shape our day-to-day decision making. Tribal Nations are sovereigns within this great country, and the FCC must have your input on the life-changing communications issues that matter most to your communities. I recognize that it can be a challenge to find the resources and that you must target them

appropriately, but I am a believer in the adage that decisions without you are usually not the best decisions for you. Your being here today provides valuable and much-needed input. Similarly, our coming—as a Commission—to Indian Country and other Native areas is equally important in making sure we are all seeing the same challenges and responding to the same sets of facts. I hope we will do that soon—and often.

With the three proceedings we launch today, we have a real opportunity, working together, to identify barriers to the deployment and adoption of communications and media services in Indian Country and to take swift action to remove these barriers. The *Native Nations Notice of Inquiry* highlights the breadth of our examination—from radio to broadband to public safety communications. Specifically, we seek input on whether to expand the Tribal Priority for the allocation and assignment of radio channels to make it easier for Native Nations to provide other services—wireless, wireline and satellite—to their communities. We ask about sustainable broadband models for Indian Country, and the funding needs for deployment, adoption and digital literacy on Tribal lands. Given the unique ways that public safety communications are provisioned in Indian Country, we seek to develop a comprehensive record on the funding, jurisdictional, geographic and other challenges to ensuring that Tribal lands have access to the ubiquitous, effective and high-quality emergency communications they need and deserve. And, for the first time to my knowledge, we ask critically important questions about accessibility barriers for persons living with disabilities on Tribal lands.

Today, we also adopt a *Native Nations Spectrum Notice of Proposed Rulemaking* aimed at promoting greater use of spectrum over Tribal lands. We propose a number of innovative ideas for maximizing the spectrum resource and expanding opportunities for wireless service to Native Americans. Among the proposals, we are looking to expand the Tribal Priority that currently applies to broadcast radio to cover commercial wireless, to require good faith on the part of incumbent wireless licensees in any negotiations for secondary market access to spectrum over Tribal lands, and to incent the building of wireless facilities by applying a safe harbor for construction obligations when a specified level of service on Tribal lands is met. Too often, wireless carriers find that they don't need to cover Tribal lands to meet our far-too-lenient build-out requirements—except, of course, if they happen to want to cover a highway that cuts through the area. I have long believed that we need to apply some degree of a use-it-or-lose-it approach when it comes to the public spectrum resource. That is why I strongly support the build-or-divest process we propose today. Under the proposal, a Tribal Government could initiate a build-or-divest process by giving us notice that it plans to extend coverage over its Tribal lands that are unserved or underserved by licensees of that spectrum and geographic area.

Last, but certainly not least, in the *Rural Radio* item we address the implementation of the Tribal Priority for radio broadcast licensing for those Tribes with very small, irregularly-shaped, or no land holdings. Our policies need to recognize that only 312 of the 564 federally-recognized Tribes occupy reservations, and I am pleased that we have initiated a waiver process to make this priority available for those Tribes. We seek further comment on ways to maximize the benefit of this priority for Tribal entities seeking FM commercial licenses.

There is a truly path-breaking idea presented in the *Rural Radio* item that proposes the use of threshold qualifications as an alternative to the Tribal Bidding Credit. The objective here is to increase opportunities for Tribal entities to own FM broadcast stations to serve their communities. I wish we had developed this idea earlier, but in light of the significant assurances I have received that its consideration will be fast-tracked, I think it may be the idea whose time has come. I am anxiously awaiting commenters' reaction to it. There are far too few radio station licenses in the hands of Native Americans—less than one-third of one percent—and this lack pulls us apart. Media can do much to bring us closer together. Native American interests are a fundamental component of the public interest obligations that this Commission is charged by law to safeguard and advance.

We have a long way yet to go to turn our words into concrete results for Native Americans. And, we are all too aware of earlier times in our shared history when hopes and promises spread across Indian Country, only to be under-cut by a lack of follow-through and, sometimes, by outright deceit. That history was often a trail of tears, and the ground is still damp with the sorrow and hurt that were visited upon generations of Native Americans. Bringing opportunity and prosperity out of that sad history is one of the major challenges confronting our country today. It is time to do justice—real justice—for Indian Country and for us all. Let us move forward together in this new spirit of hope and progress, and let us work, government-to-government, to make sure the results match the promise.

I also want to commend the adoption in the *Rural Radio* item of a rebuttable urbanized area presumption that I believe will help better serve communities and new entrant broadcasters alike. We adopt this item to avoid gaming of our 307(b) preference, which is designed to ensure the fair, efficient and equitable distribution of radio service. I believe strongly that *all* of our communities, large and small, deserve to be served.

I want to thank the Chairman and fellow Commissioners for their constructive engagement on all three items. I commend Geoff Blackwell and his fantastic team in the Office of Native Affairs and Policy for coordinating these items across the Commission, pulling in expertise from throughout the agency. I also thank and commend the Media and Wireless Telecommunications Bureaus for their major role in today's actions. I hope in the future people will look back upon this day as a truly formative, perhaps even historic, day.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (MB Docket No.09-52); Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40); Improving Communications Services for Native Nations (CG Docket No. 11-41)*

Our efforts today are an important part of the Commission's commitment to tribal sovereignty and the federal trust responsibility. I am pleased to support these opportunities to share ideas for helping to promote tribal self-sufficiency and economic development. I thank all of the honorable Tribal and Alaska Native representatives for joining us today. I also hope that this group – the Commission and all of us – will meet again somewhere on Tribal lands and Alaska Native lands.

I'll start with a bit of historical perspective. In May 2008, the Commission adopted a cap on competitive eligible telecommunications carrier access to high-cost universal service support. While controlling the growth of the fund was important, I felt it critical that the Commission include an exception to that cap for all of the providers serving tribes across the country – some of the most overlooked parts of America. This limited exception was designed to ensure that companies operating in these areas will continue to receive high-cost support to provide their services while we move toward permanent comprehensive reform of the Universal Service system. At that time, my colleagues and I pledged to resolve questions regarding the implementation of that proposed exception. I was relieved that we fulfilled that pledge – adopting an order less than a year thereafter.

Back in 2009, I was also pleased to support the First Report and Order in the "Rural Radio" proceeding, which affords a priority under Commission rules to American Indian Tribes, Alaska Native Villages, and tribal consortia, to assist them in obtaining new radio stations designed to serve Tribal and Alaska Native lands. The Second Report and Order before us today is designed to extend that relief to Tribes that lack officially recognized lands, as defined in our First Order, but that nonetheless wish to serve geographically identifiable Tribal populations. Our latest rule change provides for a waiver standard that will allow such Tribes to make a detailed showing specific to their circumstances – and is designed to balance the demonstrable needs of Tribal populations with the needs and interests of the public at large. I support this initiative as well because it aims to fulfill our statutory obligation to provide a "fair, efficient and equitable distribution of radio service" across the nation.

The Second Report and Order in the Rural Radio docket also addresses the "fair, efficient and equitable distribution" issue generally by adjusting the Commission's allotment priorities for *all* radio stations. This set of rule changes will affect proposals for new AM and FM stations, as well as city-of-license changes for existing facilities, by essentially making it presumptively more difficult to add stations to urban markets. Our action today is the latest chapter in a long history of re-adjustments the FCC has made over time in seeking to ensure that all populations – urban, suburban and rural – have access to a number of competing radio stations. Although I have some concerns about how today's decision may affect the long-term financial viability of some stations, I note that the rule changes establish only rebuttable presumptions, not blanket bans, concerning the location of stations. I will be watching with interest to see how reasonably flexible the revised approach turns out to be.

And although I am pleased that we are grandfathering some of the pending applications for new facilities under the old prioritization standard, I would have gone further to extend the same treatment to all applications on file as of today. Not every pending FCC application merits protection from rule changes that may occur before agency action on the individual adjudication, of course. A change of this

magnitude, however, warrants special consideration because it affects nearly 30 years of precedent that afforded licensees greater scope to make market-driven judgments.

Regarding the Notice of Inquiry, I am particularly encouraged that we seek to identify Commission rules that are currently barriers to the provision of service on Tribal Lands. If we identify particular rules during the comment cycle, I hope that we take a serious look at reviewing the reasons behind those rules in a timely manner and move forward in removing unnecessary barriers where appropriate.

Thank you to the staff of the multiple bureaus who contributed to these proceedings. I recognize Geoff Blackwell for his leadership in not only shepherding through these proposals today but for his tireless work here at the Commission overall as well. He is helping to ensure that Native Americans and Alaska Natives have a voice not just within these proceedings but at the Commission in general.

We obviously still have much to accomplish in this area. This is especially true as America transitions to a new broadband era. As we constantly push forward, I look forward to working with all of you, my colleagues here at the Commission, and other stakeholders to fulfill our commitments.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (MB Docket No.09-52); Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40); Improving Communications Services for Native Nations (CG Docket No. 11-41)*

I am also pleased to welcome the Native Nation leaders to this morning's meeting. For far too long, we have not engaged in an appropriate examination of the unique challenges on Native Nation lands. We have known, since at least the 2000 decennial census, that only 68 percent of households on Tribal lands in the lower 48 have basic wireline telephone service, while the national rate stands at 98 percent.

I was excited to see how much attention the National Broadband Plan devoted to attempting to address the many issues that contribute to the lack of communications infrastructure and services on Tribal lands. Although the challenges to deployment of communications infrastructure on Tribal lands are difficult, not trying to resolve them, only makes the job harder and the digital divide wider. The available studies show, that less than 10% of residents on Tribal lands, have access to terrestrial broadband networks. The main import of the National Broadband Plan's recommendations for Tribal lands, and the items we adopt today, is that we will be stronger, when all of our communities can leverage broadband, to contribute to our Nation's overall well-being. By adopting these three items, this Commission sends the message, that if we are serious about ensuring, that all Americans have access to emerging services and technologies, we must make the concerns of historically underserved communities, such as Native Nations, a top policy priority.

Furthermore, this Commission has a historic trust relationship with federally recognized Tribes. To properly fulfill our fiduciary responsibility to people living on Tribal lands, we must do more. We must commit to taking new approaches for those lands where past regulatory approaches have not worked.

Geoffrey Blackwell, and the FCC staff members who worked on these three items, have crafted a thoughtful strategy, to find solutions to the most difficult barriers to deployment and adoption on Tribal lands. With regard to those initiatives the Tribes have been seeking for years, and for which we have a developed a sufficient record, such as access to broadcast and wireless spectrum, we should strive to adopt rules as soon as possible.

I truly enjoyed working with Geoff and his team, as well as our Media Bureau, on further improving radio coverage, availability, and ownership in America's Tribal areas. I was startled to learn that 0.3 percent of the 13,000 radio facilities in this country, belong to recognized Tribes, and I applaud the Commission for addressing this disparity head-on and taking significant strides toward improvement.

Our actions, today, will serve to encourage Tribes and individuals to venture into broadcasting in order to inform and entertain their peers and neighbors, and the lack of significant broadcasting experience, will no longer be the imposing brick wall, that it once was. We are well aware of the prohibitive costs that so often keep vital and intelligent voices off the air. The threshold language in this item offers a solution to that omnipresent problem, via our strong steps toward a Tribal priority. This proceeding demonstrates that there is still a paramount and urgent need, for the Commission to ensure that licensees are meeting the needs of their service communities, and I am proud of our Bureaus for taking proactive measures to address this issue.

The wireless spectrum NPRM proposes a number of exciting new initiatives to improve the rate of wireless service coverage on Tribal lands. Notably, the Licensing Priority would allow Tribal entities to acquire valuable spectrum without an auction. Since only 10 percent of people living on Tribal lands have access to broadband networks, I am interested in creative ideas, about how we can ensure that all Tribal entities are properly informed about this opportunity. I am also pleased to see the multi-faceted approach the NPRM takes, to creating incentives for wireless licensees, to do a better job of serving people living on Tribal lands. Hopefully, the proposed Construction Safe Harbor and modifications to the Land Bidding Credit Program will encourage more entities to use their wireless licenses to serve Tribal lands.

Since we have heard that there are some licensees who have been reluctant to enter into secondary market arrangements with Tribes, it is time for the Commission to consider a process that would bring these licensees to the negotiating table. Also creative is the build-or-divest proposal, which should urge more licensees to deploy wireless networks on Tribal lands. Furthermore, it shows that this Commission is committed to allowing Tribal entities to take an active role in encouraging licensees to help them address their wireless needs. This goes a long way to improve our agency's government-to-government relationship with recognized Tribes.

Our Native Nations NOI sets forth a number of other proposals to allow for a more productive, consultative process, with Native Nations -- something I fully support. First, it is of paramount importance, that the Commission work with Native Nations, to identify successful deployment of communications infrastructure and services. Second, we should do all we can to encourage the replication of those successes on Tribal Lands. We owe all of our citizens, the benefits of a fully connected community, in order to promote public safety, education, and the economic development on Tribal Lands. Access to 9-1-1, and other public safety services, is critical to every American no matter their location. Likewise, broadband service to anchor institutions and residential areas is beneficial to our entire Nation. Thus, we must engage with our Native Nations, to ensure that they too benefit from a fully connected society.

I want to express my sincere gratitude to Commissioner Copps for his relentless efforts in shining the spotlight on the difficulties Native Nations face. Today, thanks to the leadership of Chairman Genachowski, the FCC is giving those difficulties the attention they have long deserved. We must not leave our Native Nations behind.

**STATEMENT OF
COMMISSIONER MEREDITH ATTWELL BAKER**

Re: *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures (MB Docket No.09-52); Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands (WT Docket No. 11-40); Improving Communications Services for Native Nations (CG Docket No. 11-41)*

There is no dispute that the communications needs facing Tribal nations are great. Communications services that many take for granted—something as simple as a dial tone, bars on a mobile phone, and the most basic access to the Internet—are just missing in many areas. The statistics are staggering, with some estimates putting the broadband adoption rate as low as five percent in some parts of Indian Country. When there is Internet access, it is estimated that over 90% of individuals in Tribal communities utilize the Internet at least once a day, much greater than the national average. And for that access, individuals in Tribal lands pay more on average: only 9% pay under \$20 per month for Internet access in Indian Country, compared to 18% nationally, while 11% pay between \$61 and \$80 per month for Internet access, compared to only 1% nationally.

The Commission has recognized these problems repeatedly over the last decade. In a 2000 Policy Statement on our government-to-government relationship with Indian Tribes, the Commission committed at that time to work with the Tribal communities to ensure “that Indian Tribes have adequate access to communications services.” Fast forward to Acting Chairman Copps’ 2009 report, “Bringing Broadband to Rural America,” and the Commission again recognized the “unique issues” associated with broadband deployment in Tribal lands. And most recently in the National Broadband Plan—fast approaching its first birthday—we recognized the need “to support sustainable broadband deployment and adoption in Tribal lands.” Yet we still have Native American communities with the lowest adoption rates in the country, and we are still talking about the problems without proposing any real solutions.

It is time for action, and I hope that includes leaving the confines of the Beltway to hear directly from the people impacted by this digital divide. Given the many different groups represented here today, I am certain there is no one-size-fits-all solution. I commit to consulting directly with the people of the Tribal nations as to how we can best help them, whether it’s by encouraging the deployment of fixed and mobile broadband or promoting adoption and digital literacy.

I am pleased to see the efforts of so many of our Bureaus and Offices, under the guidance and leadership of Geoff Blackwell and the Office of Native Affairs and Policy, to formulate a coordinated framework under which we can proceed. I hope that these proceedings that we initiate today lead to actual, measurable progress in addressing the communications and technology gaps facing Tribal nations.